In the Supreme Court of the United States

OCTOBER TERM 1911.

No. 784.

SOUTHERN PACIFIC COMPANY AND OREGON & CALIFORNIA RAILROAD COMPANY,
Appellants,

vs.

THOMAS K. CAMPBELL, CLYDE B. AITCHISON and FRANK J. MILLER, Commissioners constituting "Railroad Commission of Oregon," and A. M. CRAWFORD, Attorney General of the State of Oregon.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

BRIEF FOR APPELLANTS.

Statement.

This is an appeal from the decree of the Circuit Court of the United States for the District

of Oregon, entered July 18, 1911, sustaining the demurrers of the defendants to the bill of complaint, and dismissing the cause and complaint.

On October 12, 1910, the appellants filed their bill of complaint in the Circuit Court of the United States for the District of Oregon, against the defendants and respondents, to set aside an order of the Railroad Commission of Oregon made September 21, 1910, and served upon Southern Pacific Company on September 23, 1910, by which the Railroad Commission attempted to find that class rates on the Southern Pacific Company's lines from Portland to all points on its lines in Oregon, are unjust, unreasonable, and excessive; and by which the Railroad Commission attempted to find that said class rates were unjustly discriminatory as against the several stations and localities mentioned, and as between the various classes of commodities taking class rates; and by which the Railroad Commission ordered Southern Pacific Company to cease and desist imposing and collecting such alleged unjust, unreasonable, and excessive class rates, and in lieu thereof required Southern Pacific Company in the future to charge, collect and impose certain specified rates set out in the order, and to make the necessary changes in its tariffs

within twenty days from the date of service of such order. The suit is also to enjoin the defendants. The prayer of the bill is that the defendants be enjoined from taking any action, step, or proceeding to enforce any penalties or remedies for violation of this order, and that pending suit the order be suspended; that upon final hearing such order be set aside and held for naught, and the Railroad Commission Act be adjudged to be void and of no force and effect; and that a decree should be entered perpetually enjoining the defendants from attempting to enforce such order or to prosecute any suit or action against the complainant for pretended violation of said order. (Record, pages 2–48.)

To the bill of complaint the defendants filed their joint and several demurrers. The grounds of the general demurrer are as follows:

I.

That it appears upon the face of the bill herein that the court has no jurisdiction of the subject matter of the controversy between the parties.

II.

That it appears by the complainant's own showing by the said bill, that it is not en-

titled to the relief prayed by the said bill against these defendants, or any of the defendants.

III.

That said complainant has not in and by its said bill stated such a case as doth or ought to entitle it to the relief thereby sought and prayed for, from or against these defendants, or any of them.

IV.

That it appears upon the face of the bill that the complainant has an adequate remedy at law.

The defendants demurred to Paragraphs VIII and IX of the bill of complaint, and to each paragraph thereof, (Pages 25 and 26, Record) upon the following grounds:

I.

That it appears from the facts set forth in said paragraphs, and in each and all of them, that complainants are not entitled to the relief, or any part thereof, prayed for from or against these defendants, or any of them.

II.

That the facts as set out in said paragraphs, and each of them, do not state a cause of suit, or any part of a cause of suit against these defendants, or any of said defendants.

(Record, page 51)

The defendants likewise demurred specially to all of Paragraphs X, XI, XII, XIII, XIV, XV, and XVI, (Record, pages 33 to 47) upon the following grounds, to-wit:

I.

That it appears from the facts set forth in said paragraphs, and in each and all of them, that complainants are not entitled to the relief, or any part thereof, prayed for from or against these defendants, or any of them.

II.

That the facts as set out in said paragraphs, and each of them, do not state a cause of suit, or any part of a cause of suit, against these defendants, or any of said defendants.

(Record, page 52).

The Circuit Court upon a hearing of these demurrers entered an order sustaining the general demurrer and the appellants, electing to stand upon their complaint, the court entered its decree dismissing the cause and the bill of complaint (Record, page 59).

The Circuit Court filed an opinion in support of its ruling sustaining the demurrer (Record, pages 54 to 58).

Specification of Errors.

I.

That said Circuit Court erred in sustaining the demurrers and each thereof of the defendants to the bill of complaint herein.

II.

That said Circuit Court erred in dismissing said cause and said bill of complaint.

III.

That said Circuit Court erred in deciding that plaintiffs are not entitled to the relief

prayed for in their bill of complaint, or to any relief whatever in said cause.

IV.

That said Circuit Court erred in refusing to grant to plaintiffs the relief prayed for in their bill of complaint herein.

V.

That said pretended order of September 21, 1910, of the Railroad Commission of Oregon, is void and of no force and effect, in this:

(*a*) That thereby the shippers and other persons who may avail themselves of the said class rates so attempted to be ordered into effect, will take the property of plaintiffs for private use without just or any compensation, and without the consent of plaintiffs, in violation of Section 18, of Article I of the Constitution of Oregon, which provides that private property shall not be taken for public use, nor the particular services of any man be demanded without just compensation, nor, except in case of the state, without such compensation first assessed and tendered.

That said order of said Railroad Commission is unreasonable, unjust, and arbitrary,

and particularly in this: that if the same is enforced, it will deprive the Southern Pacific Company of earnings to the amount of $156,072.48 annually, which it is entitled to collect and receive in excess of the revenues that would be derived from the enforcement of said order, so as to enable plaintiffs, to receive a just and fair return upon the property of plaintiffs.

(*b*) Said Railroad Commission Act is void and of no force and effect in this: that it is an attempt to give to said defendants Campbell, Aitchison and Miller, collectively known as "Railroad Commission of Oregon," jurisdiction, power and authority to exercise legislative, executive and judicial powers, contrary to and in violation of said Section 1, of Article III of the Constitution of the State of Oregon, which provides that: "The powers of the government shall be divided into three separate departments,—the legislative, the executive, including the administrative, and the judicial; and no person charged with official duty under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided."

(*c*) Said Railroad Commission of Oregon in passing upon said class rates upon its own initiative, and hearing the testimony of

shippers, and in taking said testimony in relation thereto, attempted to and did exercise judicial functions; and in making said order, exercised legislative and judicial functions; both and each in violation of said Section 1, Article III, as aforesaid.

(*d*) Said Railroad Commission Act is void and of no force and effect in this: that it violates Section 21, Article I, of the Constitution of the State of Oregon, which provides that: "No *ex post facto* law, or law impairing the obligations of contracts, shall ever be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this constitution; Provided, that laws locating the capital of the state * * * may take effect or not, upon a vote of the electors interested."

(*e*) Said Railroad Commission Act is void and of no force and effect in this: that it violates Section 21, Article I, of said Constitution of Oregon, in this: that it is expressly provided that the said Railroad Commission of Oregon shall have and exercise authority which, when exercised, shall take effect upon their orders, and not by virtue of any law passed by the Legislative Assembly of the state.

(*f*) Said Railroad Commission Act is

void and violative of the Constitution of the State of Oregon in this: that it violates Section 1, Article VII, which provides that: "The judicial power of the state shall be vested in a Supreme Court, Circuit Courts, and County Court, which shall be courts of record, having general jurisdiction, to be defined, limited and regulated by law, in accordance with this Constitution," and particularly in this, that the said Act undertakes to deprive the complainants and all other persons of their right to contest in the courts of the state, authorized by said Section 1, Article VIII, or of any court other than the Circuit Court of the State of Oregon, for Marion County; and that the said Act is a denial to complainants and other persons of the equal protection of the laws, and deprives the complainants and other citizens of other states of the right to litigate their cause of suit in the courts of the United States, and as such is violative of the Fourteenth Amendment to the Constitution of the United States, which, among other things, provides:

"All persons born or naturalized in the United States, and subject to the Jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any persons of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

"That the said order of the said commission so attempted to be made on September 21, 1910, is void and of no force and effect, in this: that if enforced it will deprive plaintiffs of their property without due process of law, and will prevent plaintiffs from receiving a just or any return upon their properties sufficient to enable plaintiff, the Oregon & California Railroad Company, to pay its stockholders any returns or dividends upon any of its capital stock whatsoever.

(g) Said Railroad Commission Act is void and of no force and effect in this: that it violates Article I, Section 8, Paragraph 3 of the Constitution of the United States, which provides: "Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes," and is violative of Article I, Section 18, of the Constitution of the United States, which provides: "Congress shall have power to make all

laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof," and particularly in this: that the said act of the Legislative Assembly of the State of Oregon attempts to confer upon the Railroad Commission of Oregon jurisdiction over interstate commerce, and does not limit its power and authority to commerce wholly within the State of Oregon; and particularly, further, in this, that the said Railroad Commission Act necessarily attempts to and does confer upon the said Railroad Commission authority and power to take into consideration, in determining and fixing any rate for the carriage of freight or passengers upon the lines of plaintiffs within the State of Oregon, the earnings of the said plaintiffs derived from interstate traffic.

(*h*) Said order so attempted to be made as aforesaid, on September 21, 1910, is void and of no force and effect in this: that said order, if enforced, would violate Article I, Section 8, Paragraph 3, of the Constitution of the United States, and would violate Article I, Section 18, of the Constitution of the United States, hereinbefore set out, and

would be in conflict with the Act of February 4, 1887, entitled, "An Act to regulate Commerce," and the amendments thereto, and particularly the "Act to regulate Commerce," as amended June 18, 1910, in this, that the said order directly, materially, and substantially affects the rates upon practically all the interstate shipments of plaintiffs.

(*i*) Said Railroad Commission Act is void and of no force and effect in this: that it provides for excessive, unusual penalties, fines, and punishments, and thereby deprives the plaintiffs and other common carriers and citizens of the United States of the equal protection of the laws, and thereby takes property of the plaintiffs without due process of law.

(*j*) Said Railroad Commission Act and the said pretended order of September 21, 1910, and each thereof, is void and of no force and effect in this: that the same is violative of Section 10, of Article I, of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts, and particularly in this, that the said Railroad Commission Act and the said pretended order are and each of them is violative of the contract rights of plaintiffs under the Articles of Incorporation of the Oregon & California

Railroad Company and its predecessors in interest, and under the Constitution and laws of the State of Oregon, and particularly under Section 2, Article XI of the Constitution of the State of Oregon, and Section 36 of Chapter 7, of the Miscellaneous Laws of the State of Oregon, being Section 34 of the Act of the Legislative Assembly, approved October 14, 1862, providing for private corporations and the appropriation of private property therefor, hereinbefore specifically set out.

(*k*) Said order is void and of no force and effect in this: that the pretended reduction of said class rates is based upon the arbitrary approval of Class 1, now in effect by plaintiff, Southern Pacific Company, and an arbitrary spread between said class rates, adopting the arbitraries of 100 per cent for first class, 85 per cent of first class for second class, 70 per cent of first class for third class, 60 per cent of first class for fourth class, 50 per cent of first class for fifth class, 50 per cent of first class for Class A, 40 per cent of first class for Class B, 30 per cent of first class for Class C, 25 per cent of first class for Class D, and 20 per cent of first class for Class E, which said arbitrary classification and spread, and each thereof, was adopted by the said Railroad Commis-

sion in making said pretended order, and was so adopted arbitrarily and without any reference to the distance such traffic should be moved, or the character or nature of the traffic, or the service to be performed, or the compensation that should be paid therefor, and said classification is capricious and not based upon any fair consideration.

Plaintiffs further show that under said arbitrary spread or the application of said percentage to said class rates, the largest reduction is effective at points on said lines more difficult and expensive to operate by reason of mountain chains and physical difficulties.

Said pretended order is void and of no force and effect in this; that the rates sought to be prescribed by said order, in lieu of existing rates, are confiscatory of the property of plaintiffs, and will deprive plaintiffs of their property without compensation, and without due process of law.

The demurrer presents the single question: does the bill of complaint state facts sufficient to entitle complainants to the relief prayed for, or to any relief?

Summary of Facts Stated in Bill of Complaint.

The facts well-pleaded, succinctly summarized, omitting formal and jurisdictional averments, are:

That the Oregon & California Railroad Company is the owner of 670 miles of railroad, with stations, terminals and appurtenances belonging thereto, of the total value of $43,594,886.73, leased to the Southern Pacific Company on July 1, 1887, for the period of forty years from that date, under an Act of the Legislative Assembly approved February 16, 1887, which authorized said lease;

That on September 21, 1910, the Railroad Commission, pursuant to an investigation upon its own initiative, made an order that the Southern Pacific Company should cease and desist from charging, imposing and collecting for the intrastate transportation of freight taking class rates under the provisions of the Western Classification and exceptions thereto, the rates then charged, collected and imposed, and that in lieu thereof should in future charge, collect and impose the rates specifically set out and should make the necessary changes in its tariffs and file

the same with the Commission on or before twenty days from the date of service of the order, which order was served on September 23, 1910, and would have become effective under its terms, October 13, 1910.

That the Railroad Commission Act, and order, and each of them, and all the tariffs, rates, charges and regulations prescribed by said order, in violation of the Constitution of the United States and of the Act of Congress approved February 4, 1887, entitled, "An Act to regulate Commerce," and of the acts amendatory thereof and supplemental thereto, and particularly the Act of June 18, 1910; and likewise in violation of the Constitution of the State of Oregon, as particularly set out;

That the revenue of complainants derived from the transportation of interstate freight is large, and the portion thereof affected by the order, if enforced, will exceed $2,000, exclusive of interest and costs;

That the complainants have connection with the Union Pacific Railroad Company, Oregon Short Line Railroad Company, Chicago & Northwestern Railroad Company, Chicago, Rock Island & Pacific Railway Company, Chicago, Milwaukee & St. Paul Railway Company, Oregon

Railroad & Navigation Company, Northern Pacific Railroad Company, Spokane, Portland & Seattle Railway Company, Great Northern Railway Company, with all-rail connection at Portland, Oregon, and as such engaged in the movement of interstate commerce between Chicago, Milwaukee, Duluth, St. Paul, Minneapolis, St. Louis, Granger, Wyoming, Council Bluffs, Iowa, Spokane, Washington, and many other shipping points in other states of the United States;

That Southern Pacific Company with its connecting carriers is engaged in interstate commerce from New Orleans, La., Ogden, Utah, El Paso, Texas, Los Angeles, San Francisco, and other points, in the State of California, with all-rail connections into the City of Portland, and is engaged in moving interstate commerce of all kinds from these interstate points in other states than the State of Oregon, to Portland and East Portland, in said state, and that all of these connecting carriers have through published tariffs, and are engaged in the movement of interstate commerce not only to Portland and East Portland from all said points in other states, but to all points on the lines of Southern Pacific Company in Oregon, applying to such shipments the

local rates in effect and attempted to be modified by the order of September 21, 1910;

That all said interstate traffic handled by Southern Pacific Company or subject to movement over its lines in Oregon, is materially affected by ocean competition on all traffic moved out of Los Angeles and San Francisco, California, and other Bay points, in the State of California, as well as interior points in the State of California, carrying a local rate sufficient to induce movement to ocean points, which competition extends to transportation of interstate commerce from said points to Portland and East Portland, Oregon, and all points on the lines of Southern Pacific Company in Oregon, and that the reduction of such rates attempted to be effected by said order of September 21, 1910, directly and immediately affects the movement of all said interstate traffic (Record, page 29).

The particular tariffs under which this interstate commerce is moved are set out and specifically described in the bill of complaint, and it is specifically alleged that Local and Joint Freight Tariff No. 235–A, naming class and commodity rates for transportation of freight between Portland, East Portland, Portland (Jefferson Street), Oregon, and points on lines of

Southern Pacific Company in Oregon, governed, except as otherwise provided in tariff, and as amended by the Western Classification No. 47 (F. O. Becker, Agent, I. C. C. No. 5) supplements thereto and reissues thereof, which rates are attempted to be reduced by the order of September 21, 1910, is filed with the Interstate Commerce Commission, bearing I. C. C. No. 3265, thereby prescribing the use of these rates on all interstate traffic moving through Portland and destined to points on the Southern Pacific Company's lines in Oregon, which tariffs are duly filed with the Interstate Commerce Commission as required by law, together with tariffs on all interstate commerce moved by all transcontinental railroads described, moving into Portland and East Portland, and carrying interstate traffic destined to Portland and East Portland and on the lines of Southern Pacific Company, in Oregon, all of which said tariffs so filed are required to be observed by law;

That the tariffs listed, Southern Pacific Company (Pacific System, Lines in Oregon), Local and Joint Freight Tariffs, specifically set out, show through class and commodity rates from a large number of shipping points in California on the line of Southern Pacific Company, to all

points in Oregon on the lines of Southern Pacific Company in Oregon, which rates are made up by using the ocean competitive rate from San Francisco and other Bay points, to Portland, adding thereto the local class rates out of Portland and East Portland, to points on lines of Southern Pacific Company, in Oregon, and it is in terms specifically alleged, "that any reduction of existing class rates, attempted as in said order of said Railroad Commission, hereinbefore set out, directly, immediately and materially affects, changes and alters the said rates on said interstate shipments, thereby reducing said interstate rates to the extent of the said attempted reduction of the said class rates so attempted to be ordered into effect by said order No. F–125."

That the said order No. F–125, so attempted to be made as aforesaid, if put into effect, will materially and directly affect all interstate freight traffic of complainants or all other common carriers moving traffic to Portland and East Portland, and to points on the line of Southern Pacific Company, in Oregon, and thereabout complainants further allege and show that to comply with the said order aforesaid, so attempted to be made by the said Railroad Commission, reducing class

rates from Portland to points on the lines of Southern Pacific Company, in Oregon, would materially affect and reduce interstate rates (Record, page 29).

It will thus be seen that it is charged by the bill of complaint, as a fact and not as a conclusion of law, that the reduction of existing class rates, if put into effect, pursuant to the order of September 21, 1910, would directly, immediately and materially affect, change and alter the rates on all interstate shipments, and that the interstate freight traffic of the complainants and all other carriers moving traffic to Portland and East Portland, and to points on the lines of the Southern Pacific Company in Oregon, would be materially and directly affected by the enforcement of this order, and that if this order was enforced it would materially affect and reduce interstate rates.

It is further alleged that class rates from Portland, South, covered by the order, are used as basing rates on traffic originating beyond Portland, and form a portion of the through rate on this traffic having origin beyond the boundaries of the State of Oregon and destined to points on Southern Pacific Company's lines in Oregon, and that there is but one exception in the appli-

cation of class rates from northern California points, north of Marysville, to southern Oregon points, and with this exception, all traffic subject to application of class rates, originating in California, south of Marysville, and in every other state of the United States, destined to points on the Southern Pacific Company's lines in Oregon, is transported at through rates obtained by adding to the rate applying to Portland, the class rate from Portland to destination, and that some of the tariffs filed with the Interstate Commerce Commission, applicable to said interstate business, provide rates on traffic destined to points on the Southern Pacific Company's lines in Oregon, specifically authorize the addition of class rates from Portland to destination, over established routes which do not require that the traffic be transported through Portland, naming these specific tariffs.

It further appears from specific averments of the bill of complaint, in this regard, that the through interstate rate from eastern shipping points to points on the Southern Pacific Company's lines in Oregon, except as otherwise provided, are made up by adding to the terminal rates shown, the local rate published for use upon interstate traffic, which said local rates are pres-

ent class rates from terminals to points of destination, and it is shown by specific illustration, as applying to syrup, that the reduction of this interstate rate caused by the order of September 21, 1910, would be, from New York to Eugene, from $1.61 per one hundred pounds to $1.53 per one hundred pounds, in less than carload lots, and from $1.18 per one hundred pounds to $1.08 per one hundred pounds, in carload lots. A like effect would govern all other points south of Portland, on lines in Oregon, as to all of the traffic covered by these class rates which originated outside of the State of Oregon, and destined to Portland or to points on Southern Pacific Company's Lines in Oregon South of Portland.

It is respectfully submitted that it is fully and specifically charged that the order of September 21, 1910, attempting to reduce the class rates out of Portland to all points on Southern Pacific Company's lines in Oregon, directly and immediately affects and reduces the interstate rate on all traffic handled by Southern Pacific Company, and reduces that rate automatically to the extent of the reduction of the class rates attempted to be made, and it is not apparent that these allegations are conclusions of law. This

respectfully submitted that the facts could not be more clearly or distinctly or succinctly stated in these particulars.

By Paragraph X it appears that the paid-up capital stock of the Oregon & California Railroad Company is $19,000,000; the first mortgage bonds outstanding $17,745,000; and that on June 30, 1909, the unsecured indebtedness in favor of Southern Pacific Company, for advances toward operation, maintenance, and renewal of the properties, after applying all of the receipts from operation to payment of operating expenses, taxes, interest on bonded debt, and other reasonable and legitimate expenses necessarily attending the operation of the properties, was $3,207,-068.37, and that this deficit on June 30, 1906, was $[illegible]; that the outstanding $12,000,000 preferred stock represented the cost of the first 198 miles of railroad from Portland to Roseburg, and that $7,000,000 common stock represented the unpaid accrued interest thereon, and that the bonded indebtedness secured by first mortgage of July 1, 1887, to the Union Trust Company, was created for the purpose of refunding the outstanding indebtedness of the Oregon & California Railroad Company, and for the purpose of construction, extension, addition, and

betterment to the property as original capital, and was used in the extension, construction, and betterment of said properties, or redemption of valid outstanding bonds then existing, which had theretofore gone into the construction or acquisition or betterment of these properties; that all of these properties, on September 21, 1910, were under lease to the Southern Pacific Company of date July 1, 1887, for the term of forty years, under which lease the lessee was to keep the leased property in good order, condition, and repair; to operate, maintain, add to, and better the same at its own expense; pay all taxes legally assessed against the same or levied thereon; pay interest as it should mature on the first mortgage bonds, and the net earnings, if any, pay over to the Oregon & California Railroad Company. If the net earnings should exceed the amount of seven per centum upon the par value of the preferred stock, and six per centum upon the par value of the common stock, then the lessee should be entitled to receive and retain for its own use any and all excess of such balance of net earnings and income, over and above the said seven per centum and the said six per centum. That under its lease the lessee has honestly and faithfully and carefully

kept a full account of the gross operating revenues, receipts and income of the property, and of the expenditures incident thereto, including operating expenses, taxes, and interest upon bonded indebtedness, and other reasonable and necessary expenses, and that notwithstanding the lessee has so operated the properties honestly and economically and has carefully managed and operated the same, "the said properties have never at any time yielded any net income applicable to the payment of dividends upon said capital stock or any part thereof at any time during said lease, and the said properties do not now yield, under existing rates and tariffs, any net revenues from which any payment can be made by way of dividend upon said capital stock or any part thereof; that notwithstanding the faithful, careful, and economical management and administration of said properties by said Southern Pacific Company under reasonable tariffs for the movement of freight and passenger traffic during all of said time, there was a constantly increasing deficit, resulting from said operation, due and owing to the Southern Pacific Company, and the same reached, on June 30, 1906, to the extraordinary figure and sum of $6,222,037.20, which sum was reduced for the

year ending June 30, 1909, to the sum of $3,207,008.37, as aforesaid."

It is further alleged in this paragraph that the properties are of the reasonable value of a sum representing the outstanding bonded indebtedness and the deficit, and the capital stock, which the court will observe is an allegation that the properties are of the value of $39,952,008.37.

It is further alleged that the complainants are entitled to receipts and earnings from the operation of said properties, sufficient to pay a reasonable and fixed sum as annual interest upon said indebtedness, and as a dividend upon said stock, amounting to at least five per cent. per annum, upon said bonded indebtedness, and at least six per cent. per annum upon said unsecured indebtedness, and a dividend of at least six per cent. or seven per cent. per annum upon said capital stock.

These averments of fact as to the financial condition of the property are admitted to be true by the demurrer. That is to say, it is admitted that the properties are at least of the value of $39,952,008.37, and that after payment of all the necessary operating expenses incurred in economical administration of the property, including taxes and interest upon the bonded indebtedness,

the property has never at any time yielded any net income applicable to the payment of any dividend upon the capital stock.

It is further admitted by the demurrer that the Oregon & California Railroad Company is entitled to receipts and earnings sufficient to pay the interest upon the secured indebtedness at the rate of five per cent. per annum, and upon the unsecured indebtedness at the rate of six per cent. per annum, and a dividend upon the capital stock of at least six per cent. or seven per cent. per annum.

The receipts and disbursements of the property for the year ending June 30, 1902, to the year ending June 30, 1909, are set out in Paragraph X of the bill of complaint, (Record, pages 33 to 37) and are as follows:

RECEIPTS.

Year ending June 30, 1902, gross earnings	$3,509,901.37
Year ending June 30, 1903, gross earnings	4,004,983.14
Year ending June 30, 1904, gross earnings	4,308,215.05
Year ending June 30, 1905, gross earnings	4,390,401.10

Year ending June 30, 1906, gross earnings	$5,891,087.67
Year ending June 30, 1907, gross earnings	6,451,050.00
Year ending June 30, 1908, gross earnings	6,918,414.00
Year ending June 30, 1909, gross earnings	7,104,081.00

DISBURSEMENTS.

Year ending June 30, 1902, gross earnings	3,734,380.40
Year ending June 30, 1903, gross earnings	4,120,413.08
Year ending June 30, 1904, gross earnings	4,319,970.87
Year ending June 30, 1905, gross earnings	5,321,301.39
Year ending June 30, 1906, gross earnings	5,956,399.61
Year ending June 30, 1907, gross earnings	6,128,729.00
Year ending June 30, 1908, gross earnings	5,968,601.00
Year ending June 30, 1909, gross earnings	5,839,698.00

The operating revenues for the year ending June 30, 1909, amounted to.....	$6,998,949.57
Operating revenues, intrastate...	2,915,434.70
" " interstate...	3,804,613.65
Passenger revenues, intrastate...	1,507,107.24
" " interstate...	1,606,131.95
Freight revenues, intrastate.....	1,321,216.72
" " interstate	2,168,825.86

That the interstate freight business is about 64% more than the intrastate freight business, and that the annual loss affected by the reduction would be $156,072.48, notwithstanding the property under present rates, which are alleged to be reasonable, yield nothing out of which to pay any dividend on the capital stock or any part thereof, admitted to be a sum equal to $19,000,000, and being nearly one-half of the admitted value of the property.

The table of receipts and disbursements does not purport to show any more than gross earnings and expenditures, and takes no note of payment of taxes, fixed charges, or dividends. It covers a period of eight years, and the total receipts for these years are $42,578,133.33, and the total expenditures for these eight years, $41,389,493.35, making a sur-

plus on eight years' business of $1,188,639.98, with nothing paid on account of dividends upon capital stock, or, if figured upon the basis of value of the property admitted, leaving nothing as annual interest on the investment for this period of time, in excess of the capital represented by the bonded debt. This $1,188,639.98, when applied to deficits existing for the period preceding June 30, 1909, still left at that date a deficit of $3,207,008.37.

It is further specifically alleged that existing local rates affected by the order of September 21, 1910, are reasonable and just, and are made as low as the situation of the properties and the competitive conditions of the business, both intrastate and interstate, will permit or allow, and that the said compensation charged upon said existing tariffs is reasonable and just, and affords but slight compensation above the cost of service; that the decrease attempted to be made, if enforced, will deprive the companies of large sums of annual revenues and compel the companies to give the use of their properties without reasonable or just compensation for such services, and will deprive the companies of their properties without due or reasonable compensation (Record, page 37).

It is further alleged that the reduction will compel the companies to increase their rates upon traffic not affected by the order, and particularly the products of the soil, forest, and farm, many of which now receive and enjoy terminal rates, including such commodities to be sold and consumed in the markets of the world, thereby compelling the companies to discriminate against such products to the injury of the companies and of the public.

That the largest decrease in the class rates affects classes four and five, and that under these classes, consisting of staples, particularly groceries and hardware, are moved both intrastate and interstate, and that the decrease as to such commodities under such classes approximates about twenty per cent. of the existing rates, and that this decrease will be largely, if not mainly, of benefit only to jobbers and dealers in such staple products, which jobbers and dealers have made and now are making large and excessive profits under existing class rates, and will, if put into effect, still further increase the profits of these jobbers and dealers, at the expense of the companies and of the public at large (Record, page 37).

It will thus be seen that the averments of the

complaint challenge the reasonableness of the rates prescribed by the order, and thereby tender a material issue of fact.

In Paragraph XI, (Record, pages 37 and 38), it is alleged that on June 30, 1909, the Oregon & California Railroad Company owned 666.07 miles of main line track, and 114.06 miles of side track, with the usual stations and terminals incident to operation, all of which property is devoted to public use and upon which the companies are entitled to a just and reasonable return, and "upon which your orators have never received for the stockholders of the Oregon & California Railroad Company anything in dividends."

That two lines of railroad are maintained and operated on the west side of the Willamette River, and two on the east side of the Willamette River, in competition with each other, with the Willamette River between them; that the main line passes over two mountain ranges in a difficult and expensive country in which to operate and maintain railroads, and that all interstate business coming from and going to California and all points beyond, passes over the Siskiyou Mountains, one of these mountain ranges; that these four lines of railroad are operated in the Willa-

mette Valley, sixty miles in width, for 125 miles south from Portland, with a navigable river in the center, navigable for common carriers by boat to Albany and Corvallis, in open and active competition, and that the City of Portland is located on the Willamette River twelve miles from the Columbia River, at the head of ocean navigation for deep-sea and coast-wise vessels, creating competition in business from San Francisco, Los Angeles, and other Pacific ports, to Portland; and that the Oregon Electric Railway Company is actively operating and maintaining in competition with the line of railroad of complainants, an interurban electric line for the carriage of freight and passengers from Portland to Salem, and from Portland to Forest Grove, with transcontinental connection with transcontinental competitors at Portland, and is about to extend its line to McMinnville, Albany, and Eugene, Oregon;

That the carload merchandise tonnage received at points on lines of Southern Pacific Company for one year, is 99,264 tons, yielding a revenue of $777,984.00, all of which will be directly affected by the application of class rates, and 15,203 tons of carload commodities, yielding a revenue of $210,888.82, likewise affected, or a

total of 114,467 tons, yielding a revenue of $1,088,872.82, or about thirty-nine per cent. of the total tonnage and seventy-four per cent. of the total revenue, the whole of which is upon freight received; that the total freight revenue for the year ending June 30, 1909, was $3,490,042.58, of which $1,088,872.82 was revenue derived from freight received, affected by the application of class rates, amounting to thirty-one per cent. of the total freight revenues of the companies, and that the per centage of forwarded traffic affected by class rates would materially increase this percentage.

Paragraph XII of the complaint (Record, pages 39 and 40), pleads the incorporation of the Oregon & California Railroad Company and its predecessors in interest, under the laws of the State of Oregon, and the provisions of the law and Constitution of the state in effect at the time, under which it claimed that the companies have a vested right to collect and receive such tolls or freights for transportation as the companies may prescribe, and that this order of the Railroad Commission, if put into effect, will impair the obligation of the contract thus made by these Articles of Incorporation, with the State.

Paragraph XIII of the complaint (Record,

pages 40–42), sets out Sections 33 and 51 of the Railroad Commission Act. By Section 51, it appears that if the companies should omit to observe the order of September 21, 1910, they would be liable to any one injured thereby, in treble the amount of damages sustained in consequence of such violation, together with a reasonable counsel or attorney's fee to be fixed by the court, in every case of recovery, which attorney's fee should be fixed and collected as part of the costs in the case. It is further provided that any recovery authorized by this section should in no manner affect a recovery by the state of the penalty prescribed for such violation. The penalty there referred to is that provided in Section 53 of the Railroad Commission Act, which provides that for every such violation, failure or refusal, the railroad shall forfeit and pay into the State Treasury a sum of not less than $100.00 nor more than $10,000.00 for such offense. This is in addition to the penalty of treble damages, including attorney's fees, awarded to every shipper who might be injured by the failure or neglect of the railroad company to put these rates into effect.

Section 33, as amended February 23, 1909, set out in Paragraph XIII, provides the manner by

which the railroad company may, for cause shown, obtain a stay of enforcement of the order upon giving a bond approved by the court, but this bond is conditioned that the railroad company shall answer for all damages caused by the delay in the enforcement of the order, and all compensation for whatever sums for transportation any person or corporation shall be compelled to pay in excess of the sum such person or corporation would have been compelled to pay if the order of the Commission had not been suspended. Any person paying charges found to be excessive shall have a claim for the excess, and unless refunded within thirty days after written demand made after final judgment, may recover the same by action against the railroad and the sureties on the bond.

It is further alleged that the Railroad Commission Act is oppressive and confiscatory, and affords to complainants no adequate or sufficient remedy to protect the property of complainants; that the provisions of the Act are not uniform and are unequal in their application to the various persons and transportation companies affected thereby, and that by the terms of the Act complainants are subjected to excessive penalties in the event

they should refuse to obey or observe the order, and that the Act and order deny to complainants and each of them the equal protection of the laws, and deprive them and each of them of their property and the property of each of them without due process of law, and that the Railroad Commission Act and order are, and each of them is, by reason of the premises, unconstitutional and void.

The allegations of Paragraph XIII, (Record, pages 40-42) present legal questions and in succinct and direct terms attempt to raise the questions of law suggested, further urging that under Section 1 of Article III of the Constitution of the state, providing that the powers of the government shall be divided into three departments, the legislative, the executive (including the administrative), and the judicial, and providing that no person charged with official duties under one of these departments shall exercise any of the functions of another, that the Railroad Commission Act is void in that thereby the Commission is clothed with legislative, executive and judicial powers.

By Paragraph XIV, (Record, pages 42 and 43) it is alleged that the defendants threaten to prosecute complainants for the penalties pro-

vided by the Act, and that unless restrained they will institute proceedings against the complainants and particularly against the Southern Pacific Company to compel it to publish and put into effect these rates; that said proceedings will thereby compel complainants to observe and put into effect rates prescribed in said order "causing complainants great and irretrievable loss and damage, and divesting complainants of their property without due process of law, and confiscating to the use of the public the property of the complainants in excess of about $300,000.00 per annum, and will expose your orators, and particularly the Southern Pacific Company, to the danger of excessive fines and penalties provided for in said Act, and will, in effect, confiscate the property of your orators."

It is further alleged by Paragraph XIV that these proceedings would compel the complainants to put into effect rates and regulations governing and affecting interstate traffic passing over the lines of railroad of complainants, and the other railroads mentioned in the bill of complaint, contrary to the Act of February 4, 1887, and the amendments thereto, and the regulations of the Interstate Commerce Commission, and contrary to the terms, provisions, tariffs and

regulations prescribed by and now appearing in the tariffs hereinbefore issued by the complainants and other carriers engaged in interstate commerce, and concurred in by other railroads mentioned in the bill of complaint, which have been duly filed with the Interstate Commerce Commission, and are now in full force and effect.

It is respectfully submitted that this is a direct allegation that the action of the Railroad Commission in attempting to enforce the order of September 21, 1910, by these suits and actions, to recover penalties, would compel the Southern Pacific Company to put into effect rates governing and affecting interstate traffic mentioned, notwithstanding existing tariffs in effect and having the full force of law, filed with the Interstate Commerce Commission.

It is further alleged that unless restrained and enjoined from so doing, the defendants threaten to and will subject complainants to liability to pay fines and penalties in such sums as will confiscate the property of complainants and will subject them, through the loss of traffic and earnings therefrom, to great and irretrievable loss, damage, and injury.

By Paragraph XV (Record, pages 43–46), it is averred in direct terms that the order of the Rail-

road Commission is void and of no force and effect, in this:

(*a*) That thereby the shippers and other persons who may avail themselves of the said class rates so attempted to be ordered into effect, will take the property of complainants for private use without just or any compensation, and without their consent, in violation of Section 18, of Article I, of the Constitution of Oregon; that the order is unreasonable, unjust, and arbitrary, and particularly in this: that if enforced it will deprive the Southern Pacific Company of earnings to the amount of nearly $300,000.00 annually, which it is entitled to collect and receive in excess of the revenues that would be derived from the enforcement of the order, so as to enable the complainants to receive a just and fair return upon the property of complainants.

(*b*) That the Railroad Commission Act is void and of no force and effect in that it is an attempt to give the Railroad Commission jurisdiction, power, and authority to exercise legislative, executive and judicial powers, contrary to and in violation of Section 1, of Article III of the Constitution of the State of Oregon.

(*c*) That said Railroad Commission of Oregon, in passing upon said class rates and

hearing testimony of shippers, and taking testimony in relation thereto, attempted to and did exercise judicial functions, and in making the order exercised legislative and judicial functions, both and each in violation of Section 1, Article III of the Constitution.

(*d*) That the Railroad Commission Act is void and of no force and effect in that it violates Section 21, Article I, of the Constitution of the State of Oregon, which provides that no *ex post facto* law, or law impairing the obligation of contracts, shall be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution.

(*e*) That the Railroad Commission Act is void and of no force and effect in that it violates Section 21, Article I, of the Constitution of the State of Oregon, in this: that it is expressly provided that the Railroad Commission shall have and exercise authority which, when exercised, shall take effect upon their orders, and not by virtue of any law passed by the Legislative Assembly of the State.

(*f*) Said Railroad Commission Act is void in that it violates Section 1, Article VII, of the Constitution of the State of Oregon,

which vests the judicial power of the State in the Supreme, Circuit, and County Courts; and particularly in this, that the act undertakes to deprive the complainants and all other persons of their right to contest in the courts of the state, authorized by this section, or of any court other than the Circuit Court of the State of Oregon, for Marion County, and that the act is a denial to complainants and other persons of the equal protection of the laws, and deprives the complainants and other citizens of the right to litigate their cause of suit in the courts of the United States, and as such violates the Fourteenth Amendment to the Constitution of the United States; that the order of Sept. 21, 1910, is void, in this: that if enforced it will deprive complainants of their property without due process of law, and will prevent complainants from receiving a just or any return upon their properties sufficient to enable the Oregon & California Railroad Company to pay its stockholders any return or dividend upon any of the capital stock whatsoever.

(*g*) That said Railroad Commission Act is void in that it violates Article I, Section 8, Paragraph 3, of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with

foreign nations and among the several States, etc., and is violative of Section 18, Article I, of the Constitution of the United States, which gives authority to Congress to pass the necessary laws for carrying into execution the interstate commerce clause of the Constitution; and that the Railroad Commission Act attempts to confer jurisdiction over interstate commerce, and does not limit its power and authority to commerce wholly within the State of Oregon, and that it confers upon the Railroad Commission authority and power to take into consideration, in determining and fixing any rate for the carriage of freight or passengers upon the lines of complainants within the State of Oregon, the earnings of complainants derived from interstate traffic.

(*h*) That said order is void in this: that if enforced it would violate Article I, Section 8, Paragraph 3, and Article I, Section 18, both of the Constitution of the United States, and would be in conflict with the Act of February, 4, 1887, entitled, "An Act to Regulate Commerce," and the amendments thereto, and particularly as amended June 18, 1910, in this: "that the said order directly, materially and substantially affects the rates upon practically all the interstate shipments of your orators." It might be

suggested that this is another averment of a material fact.

(*i*) Said Act is void in this: that it provides for excessive, unusual penalties, fines and punishments, and thereby deprives the complainants of the equal protection of the laws, and takes their property without due process of law.

(*j*) The Act and order and each thereof is void in this: that each violates Section 10, Article I, of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts, and particularly in this, that the order and act violate the contract rights of the complainants under the Articles of Incorporation of the Oregon & California Railroad Company and its predecessors in interest, under the Constitution and laws of the State of Oregon, and the Act of Congress of October 14, 1862, by which the companies were authorized to fix the tolls and charges for their services.

(*k*) Said order is void and of no force and effect in this: that the pretended reduction of said class rates is based upon the arbitrary approval of Class 1, now in effect, and an arbitrary spread between said class rates, adopting the arbitraries of 100 per cent. for first class, 85 per cent. of first class for sec-

ond class, 70 per cent. of first class for third class, 60 per cent. of first class for fourth class, 50 per cent. of first class for fifth class, 50 per cent. of first class for Class A, 40 per cent. of first class for Class B, 30 per cent. of first class for Class C, 25 per cent. of first class for Class D, and 20 per cent. of first class for Class E, " which said arbitrary classification and spread, and each thereof, was adopted by the said Railroad Commission in making said pretended order, and was so adopted arbitrarily and without any reference to the distance such traffic should be moved, or the character or nature of the traffic, or the service to be performed, or the compensation that should be paid therefor, and said classification is capricious and not based upon any fair consideration. And your orators further show that under said arbitrary spread, or the application of said percentage to said class rates, the largest reduction is effective at points on said lines more difficult and expensive to operate by reason of mountain chains and physical difficulties."

This, it is respectfully submitted, when read in connection with the averment elsewhere in the bill of complaint that the rates prescribed by the order of September 21, 1910, are unreason-

able, is a direct challenge of the validity of this order, and a charge that "the classification and spread was arbitrarily adopted without reference to the distance such traffic should be moved, or the character or nature of the traffic, or the service to be performed, or the compensation to be paid, and that such classification is capricious and not based upon any fair consideration." We know of no other words that could challenge the reasonableness of the rates or the reasonableness of the classification in any more direct language than has been used. The demurrer admits the truth of these allegations.

> (1) Said pretended order is void and of no force and effect in this: that the rates sought to be prescribed by said order, in lieu of existing rates, are confiscatory of the property of your orators, and will deprive your orators of their property without compensation and without due process of law.

The questions raised by the demurrer to the complaint are:

> (1) Does the order of September 21, 1910, directly and materially affect the interstate commerce of the complainants, and does the order amount to a direct regulation of the interstate rates which the complainants are re-

quired to observe in order to move their interstate traffic to and from all points on the lines in Oregon of the Southern Pacific Company between Portland and the California State Line, and if so, is such order void as a direct regulation of and interference with interstate commerce? Is the Railroad Commission Act void because inconsistent with the amended Interstate Commerce Act?

(2) Does the bill of complaint state facts sufficient to show that the order of September 21, 1910, if put into effect, would deprive the complainants of a just and fair return upon the value of their properties?

(3) Will the court judicially review the order of September 21, 1910, and determine as a judicial question whether or not the rates ordered into effect are reasonable or unreasonable? And in this respect:

Was the reduction of class rates made by the order of September 21, 1910, based upon the arbitrary approval of Class 1, and an arbitrary spread between the class rates; and was this arbitrary classification and spread so adopted arbitrarily without any reference to the distance such traffic should be moved, or the character or nature of the traffic, or the service to be performed, or the compensation which should be paid therefor, and not based upon any fair consideration,

and are the rates prescribed by the order in lieu of existing rates confiscatory of the property of the complainants, and will these rates deprive the complainants of their property without compensation, and is it true that the rates now in effect yield to the complainants but little compensation in excess of the actual cost of movement of this traffic? That is, in excess of the cost of the service?

(4) Is such order and the Railroad Commission Act, and each of them, violative of the contract rights of the complainants under the Articles of Incorporation of the Oregon & California Railroad Company and its predecessors in interest, claimed by complainants under Section 2, Article XI of the Constitution of the State of Oregon, and Section 34 of the Act of the Legislative Assembly approved October 14, 1962? That is to say, do these Articles of Incorporation constitute a contract which cannot be impaired by the Railroad Commission Act or by the order of Spetember 21, 1910?

(5) Is the Railroad Commission Act void because of excessive penalties and unusual burdens imposed for any refusal to observe the order of the Commission, and is the Act oppressive and confiscatory by reason of such excessive penalties and burdens imposed by the Act?

(6) Is the Act void in this, because it requires complainants to prosecute any suit to set aside any order made by the Commission, in the Circuit Court of the State of Oregon for the County of Marion, and thereby deprives the complainants of their right to litigate their cause in any other court of the state and in the courts of the United States, and is therefore violative of the Fourteenth Amendment to the Constitution of the United States.

(7) Can jurisdiction be conferred upon a court to determine, as a fact, whether or not the rates prescribed by the order of September 21, 1910, are unreasonable, and is the Act void because it provides by its express terms for a judicial review of any order of the Commission affecting rates, fares, charges, classifications, joint rate or rates, regulations, practice, or service?

(8) If the Act is valid and confers authority upon the courts to review and set aside a rate or body of rates promulgated by the Commission, when found by the court to be unreasonable, as distinguished from the inquiry as to the confiscatory character of such rate or rates, will the Federal Court administer this relief and enforce this right created by a state statute and assume jurisdiction to determine whether or not

such rates are unreasonable in and of themselves, and independently of the question whether or not the reduction effected by such rates would deprive the railroad company of a just and fair return upon its property? That is, independently of the question whether or not the reduction would amount to confiscation in whole or in part.

POINTS.

I.

The order of September 21, 1910, upon the facts stated in the bill of complaint, necessarily and directly interferes with, regulates, and affects interstate commerce, and particularly interstate commerce moving to Portland and other Oregon line points, thereby discriminating in favor of Portland and Portland jobbers, and against points originating shipments in other states destined to Oregon line points other than Portland, and substantially burdens such interstate commerce, in violation of Section 8, Article I, of the Constitution of the United States, and is in conflict with the Act of Congress of February 4, 1887, entitled, "An

Act to Regulate Commerce," and the amendments thereto, and is therefore void.

Shepard v. N. P. Ry. Co., 184 Fed. 765.

Louisville & N. Ry. Co. v. Eubank, 184 U. S. 27-39.

Western Union Tel. Co. v. Kansas, 216 U. S. 27, 35.

St. L. & S. F. R. Co. v. State, 26 Okla. 62, 72.

D. L. & W. R. Co. v. Stevens, 172 Fed. 395.

Huntley v. Kansas City So. Ry. Co., 187 U. S. 617, 620.

Darnell & Son v. Memphis, 208 U. S. 113.

American Steel & Wire Co. v. Speed, 192 U. S. 500, 519.

Kelley v. Illinois, 188 U. S. 1.

Wabash, etc. Ry. Co. v. Illinois, 118 U. S. 557, 570.

Rhodes v. Iowa, 170 U. S. 412.

Walton v. State of Missouri, 91 U. S. 275, 280.

Herndon v. C. R. I. & P. Ry. Co., 218 U. S. 135, 156.

Whether or not the bill of complaint sufficiently alleges that the order of September 21, 1910, directly and materially affects the inter-

state commerce of the complainants, and whether such order, read in connection with these averments, constitutes a direct regulation of interstate commerce, is, as it seems to us, not open to controversy. The demurrer admits the allegations in this respect, and they are ample and full.

The legal question involved is one of great importance. It is unnecessary in the discussion of the validity of this order, under this point, to determine the validity of the Railroad Commission Act, or to assume that a state commission cannot make any intrastate rate.

It is claimed that the order made in this case directly and necessarily interferes with, regulates, and affects interstate commerce, and particularly interstate commerce in the classes named, moving to Portland and other Oregon line points, thereby discriminating in favor of Portland and Portland jobbers, and against points originating shipments in other states destined to Oregon line points other than Portland. If such is the necessary result of the reduction made by the order, although ostensibly and nominally the order relates to traffic moved under class rates from Portland to points south on the lines in Oregon, then the order reducing the rates would

be in violation of the Interstate Commerce Act, and the rates promulgated by this order cannot be constitutionally sustained.

It may be claimed that it is optional on the part of the Southern Pacific Company to make an interstate rate from points outside of the State of Oregon to points south of Portland on its lines, by adding the local rate from Portland south. This is not true, as a matter of fact, for if Southern Pacific Company and other carriers who are competitors of Southern Pacific Company should make an interstate rate into Portland as a basing point, from Chicago, St. Louis and Atlantic seaboard points, and to points on Southern Pacific Company's lines south of Portland, as a through rate, such interstate rate could not be higher than the rate to Portland, with the local rate from Portland to the interior point, for if it were higher, all the business would come to Portland either by water or by the rail route, and the Portland jobbers would supply the dealers on Oregon line points south of Portland, thereby depriving the dealers on Oregon line points south of Portland, and the shippers and manufacturers at Chicago, St. Louis and elsewhere, of their right to have the business upon an equal rate, and in order to

prevent a discrimination in favor of the Portland jobbers and against other competitors in other states, the Southern Pacific Company and its connections would be compelled to reduce their interstate rate thus made, or else forfeit the business upon a through haul. In other words, the rates as made by the Oregon Commission affect commodities moving under these class rates, that necessarily and are largely made outside of the State of Oregon to Portland or to Oregon line points, and the rate from Chicago to Medford, on a through haul, must be the same rate as the rate from Chicago to Portland, as a basing point, with Portland to Medford added. This is so because of conditions over which the carrier has no control, and which the Oregon Commission in promulgating these rates was bound to consider.

Speaking upon this subject, Master in Chancery OTIS, in *Shepard v. Northern Pacific Co.* (184 Fed. Rep., 765), *et al.* says at p. 777:

> "Any substantial change in the basis of rates thus established and in force or in any particular rate due only to the fact that the transportation was interstate, or that it was local to a state, would have been actual, undue and unjust discrim-

ination in fact and any substantial difference in rates for the transportation of passengers, merchandise or commodities maintained by either of said companies as between traffic local to the State and traffic which goes between the State of Minnesota and either of its neighboring states, will constitute actual, undue, and unjust discrimination in fact.

* * * * * *

"Superior, Wis., and Duluth, Minnesota, are situated side by side at the western extremity of Lake Superior. Each is an important business center. Conditions attending transportation to and from either of them are the same as to or from the other. The railroad companies reaching them have always accorded them and do accord them like rates in and out. They ship and receive the same kinds of freight and to and from the same localities. Any substantial difference in the rates accorded them would destroy the commerce of the city given the higher rates. The propriety of a parity of rates to and from these localities has always been recognized (p. 779).

* * * * * *

"If these companies after the installation of the rates prescribed by the order for transportation within Minnesota, had continued

to maintain the former rates for transportation between Minnesota and an adjoining state, the result would have been serious discrimination against localities in the neighboring states (p. 779). * * *

"These reductions were compelled by the necessary and direct effect of the operation of the order. Had they not been made, Superior could not have competed in business in Minnesota with Duluth, Fargo, Grand Forks and Wahpeton could not have competed with Moorhead, East Grand Forks, and Breckenridge, respectively, nor could Superior have transacted business successfully with Fargo, Grand Forks, or Wahpeton. Moreover, although the Northern Pacific suffered a substantial loss in revenue from its interstate business, it had the choice of submitting to that loss or of suffering substantial destruction of its interstate commerce in articles covered by the order between these localities" (p. 780).

In other words, applying the language of Judge OTIS to the facts pleaded in the bill of complaint in the case at bar, if the Southern Pacific Company is compelled to reduce its class rates from Portland to all points south, then all commodities covered thereby, which move upon an interstate rate from Chicago and other points

in other states to Portland, and to points on the Oregon lines south of Portland, must move upon an interstate rate upon a through haul which equalizes the reduction, or else Portland jobbers and other persons desiring to ship these commodities from Portland would have the benefit of the discrimination. The penalty for obedience to this order would be a loss of the interstate business of Southern Pacific Company from all points in other states, whether moving over Southern Pacific Company lines to Portland by rail or by water, and in that way its proportion of earnings by this interstate traffic would be lost.

In *Shepard v. Northern Pacific Ry. Co.*, 184 Fed. 765, SANBORN, Circuit Judge, in a lengthy opinion, presents an exhaustive discussion of the legal questions involved, and sustains the opinion and report of Master in Chancery OTIS. In the course of the opinion the court says at p. 769:

> "The first question for consideration is whether or not the orders of the Commission and the acts of the Legislature substantially burden interstate commerce, and the answer to this question must be drawn from an application of the facts which disclose their effect to the established rules of law which govern this subject.

"These orders and acts by their terms relate to intrastate fares and rates only. Counsel for the defendants insist that in the police power of the state is vested plenary authority to make and enforce them because they relate to commerce within the state only, while the complainants argue that their enforcement is beyond the power of the state because the effect of their necessary operation is substantially to burden interstate commerce, and hence to invade the exclusive domain of the nation, in violation of the commercial clause of the Constitution (Article I, Sec. 8).

"The principles and rules of law by which these orders and acts must be tried have been conclusively established by the decisions of the Supreme Court, and it will not be unprofitable to state them here again, and to bear them constantly in mind during the consideration of the facts which must determine the issue here presented.

"The power to regulate commerce among the states was carved out of the general sovereign power by the people when the national government was formed, and granted by the Constitution to the Congress of the nation. That grant is exclusive. The United States may exercise that power to its utmost extent, may use all means requi-

site to its complete exercise, and no state, by virtue of any power it possesses, either under the name of the police power or under any other name, may lawfully restrict or infringe this grant, or the plenary exercise of this power; for these are paramount to all the powers of the state, and inhere in the supreme law of the land. The fares and rates of transportation of passengers and freight in interstate commerce are national in their character, and susceptible of regulation by uniform rules. The silence or inaction of Congress relative to such a subject is a conclnsive indication that it intends that the interstate commerce therein shall be free, so far as the Congress has not directly regulated it. *Welton v. State of Missouri*, 91 U. S. 275, 282, 23 L. Ed. 347; *Brown v. Houston*, 114 U. S. 622, 631, 5 Sup. Ct. 1091, 29 L. Ed. 257; *Bowman v. Chicago, etc. Ry. Co.*, 125 U. S. 465, 485, 507, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; *Walling v. Michigan*, 116 U.S. 446, 455, 456, 6 Sup. Ct. 454, 29 L. Ed. 691; *Hall v. De Cuir*, 95 U. S. 485, 490, 24 L. Ed. 547; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 570, 573, 7 Sup. Ct. 4, 30 L. Ed. 244.

"To the extent necessary completely and effectually to protect the freedom of and to

regulate interstate commerce, the nation by its Congress and its courts may affect and regulate intrastate commerce, but no farther.

"To the extent that it does not substantially burden or regulate interstate commerce a state may regulate the intrastate commerce within its borders, but no farther.

"If the plenary power of the nation to protect the freedom of and to regulate interstate commerce and the attempted exercise by a state of its power to regulate intrastate commerce, or the attempted exercise of any of its other powers, impinge or conflict, the former must prevail and the latter must give way, because the Constitution and the acts of Congress passed in pursuance thereof are the supreme law of the land, and 'that which is not supreme must yield to that which is supreme.' *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678; *Gibbons v. Ogden*, 9 Wheat. 1, 209, 210, 6 L. Ed. 23; *Wabash St. L. & P. Ry. Co. v. Illinois*, 118 U. S. 557, 573, 7 Sup. Ct. 4, 30 L. Ed. 244; *Covington, etc. Bridge Co. v. Kentucky*, 154 U. S. 204, 211, 212, 216, 217, 222, 14 Sup. Ct. 1087, 38 L. Ed. 962; *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 327, 328, 26 Sup. Ct. 491, 50 L. Ed. 772; *Cleveland, C., C. & St. L. R. Co. v. Illinois*, 177 U. S. 514,

517, 519, 521, 20 Sup. Ct. 722, 44 L. Ed. 868; *Mississippi Railroad Commission v. Illinois Central R. Co.*, 203 U. S. 335, 343, 27 Sup. Ct. 90, 51 L. Ed. 209; *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 28 Sup. Ct. 121, 52 L. Ed. 230; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 24, 27, 37, 37, 30 Sup. Ct. 190, 54 L. Ed. 355; *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146, 162, 30 Sup. Ct. 280, 54 L. Ed. 423; *Pullman Company v. Kansas*, 216 U. S. 56, 65, 30 Sup. Ct. 232, 54 L. Ed. 378; *Hall v. De Cuir*, 95 U. S. 485, 488, 490, 497, 498–513, 24 L. Ed. 547; *Bowman v. Chicago, etc. Ry. Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; *Welton v. Missouri*, 91 U. S. 275, 280, 23 L. Ed. 347; *Crutcher v. Kentucky*, 141 U. S. 47, 57, 58, 59, 11 Sup. Ct. 851, 35 L. Ed. 649.

"Thus a part of every interstate transportation is carried on within the state of its initiation and concluded within another state, but neither state may fix or regulate the fares or rates of the part within its borders, because the authority so to do is requisite to the complete preservation of the freedom of, and to the untrammeled regulation of, that transportation, and this power is vested exclusively in the nation. *Wabash, etc. R. R. Co. v. Illinois*, 118 U. S. 557, 575, 7 Sup. Ct. 4, 30 L. Ed. 244.

"The nation and many states provide that carriers may not charge a higher rate for a short haul than for a long haul of like articles in the same direction under similar circumstances. But where the long haul is interstate, although the short haul is entirely within a single state, such a state may not enforce such a law for the same reason. *Louisville & Nashville R. Co. v. Eubank*, 184 U. S. 27, 42, 43, 22 Sup. Ct. 277, 46 L. Ed. 416.

"A state has the general power to prescribe the terms under which foreign corporations may carry on business within it, but any attempted exercise of that power by statute or otherwise in such a way as to prohibit or substantially to burden the interstate commerce of a foreign corporation within its borders is unconstitutional and void. *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 27, 37, 30 Sup. Ct. 190, 54 L. Ed. 355; *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146, 162, 30 Sup. Ct. 280, 54 L. Ed. 423; *Pullman Co. v. Kansas*, 216 U. S. 56, 65, 30 Sup. Ct. 232, 54 L. Ed. 378; *Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. 1, 6–11, 12, 13, 84 C. C. A. 167, 172, 177."

Applying these principles to the facts disclosed

in the instant case, Judge SANBORN says at p. 772:

"On the other hand, the laws of a state or the orders of its commissions relating to its intrastate commerce which by their necessary or natural or probable operation have the effect substantially to burden interstate commerce, are beyond its powers, violative of the commercial clause of the Constitution, and void. * * *

"The acts of the Legislature of Minnesota and the orders of its commission are so general and so far reaching in their effect that there is no doubt that they unavoidably affect the interstate commerce of the companies. In the light of the rules and decisions reviewed, the question here at issue therefore becomes: Do these statutes and orders substantially burden or only incidentally or remotely affect the interstate commerce of the companies? This question, however, may not be answered by the words or terms of the laws and orders, or by a consideration of the intent or purpose of their makers alone. The touchstone to the true answer to the question and the test of the validity of the orders and statutes is their effect upon interstate commerce.

"It is the effect, and not the terms or pur-

pose, of state regulations of its local commerce, that determines whether or not they so substantially burden interstate commerce that they violate the commercial clause of the Constitution. And this is a judicial question which each court must determine on its own responsibility on the special facts of each particular case, and in the determination and decision of which "it must obey the Constitution rather than the lawmaking department of the government." *Minneapolis, etc. Ry. Co. v. Kansas*, 123 U. S. 623, 661, 8 Sup. Ct. 273, 31 L. Ed. 205; *Henderson v. Mayor of New York*, 92 U. S. 259, 268, 23 L. Ed. 543; *Minnesota v. Barber*, 136 U. S. 313, 329, 330, 10 Sup. Ct. 862, 34 L. Ed. 455; *Brimmer v. Rebman*, 138 U. S. 78, 81, 11 Sup. Ct. 213, 34 L. Ed. 862; *Cleveland, etc. Ry. Co. v. Illinois*, 177 U. S. 514, 522, 20 Sup. Ct. 722, 44 L. Ed. 868; *Louisville & Nashville R. R. Co. v. Eubank*, 184 U. S. 27, 45, 22 Sup. Ct., 277, 46 L. Ed. 416; *Galveston, Harrisburg, etc. Ry. Co. v. Texas*, 210 U. S. 217, 227, 28 Sup. Ct. 638, 52 L. Ed. 1031; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 24, 27, 30, 30 Sup. Ct. 190, 54 L. Ed. 355; *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146, 160, 30 Sup. Ct. 280, 54 L. Ed. 428."

It was there contended, as here, that it is only where orders and statutes by their terms or by their construction substantially or directly regulate interstate commerce or disclose an intent so to do that they may be adjudged violative of the commerce clause. This contention cannot be sustained.

In support of these views Judge SANBORN cites *Galveston, Harrisburg etc. Ry. Co. v. Texas*, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031, where the court said at page 227:

> "Neither the state courts, nor the Legislatures, by giving the tax a particular name, or by the use of some form of words, can relieve them of the duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

To the like effect is the case of *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, where the court, speaking by Mr. Justice HARLAN, says at p. 27:

> "But it is said that none of the authorities cited are pertinent to the present case, because the state expressly disclaims any

purpose by the statute in question to obstruct or embarrass interstate commerce, but seeks only to prevent the Telegraph Company from entering the field of domestic business in Kansas without its consent and without conforming to the requirements of its statute. But the disavowal by the state of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction as the adjudged cases abundantly show."

Mr. Justice WHITE, in a concurring opinion in *Pullman v. Kansas*, 216 U. S. 56, says at p. 65:

"Even though a power exerted by a state, when inherently considered, may not in and

of itself abstractly impose a direct burden on interstate commerce, nevertheless such exertion of authority will be a direct burden on such commerce if the power as exercised operates a discrimination against that commerce, or, what is equivalent thereto, discriminates against the right to carry it on. *Darnell v. Memphis*, 208 U. S. 113; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, and authorities there cited."

In *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146, 162, Mr. Justice HARLAN, speaking for the court, says at p. 162:

"According to well-settled rules of statutory construction, the validity of a statute, whatever its language, must be determined by its effect or operation, as manifested by the natural and reasonable meaning of the words employed. *Henderson v. Mayor*, 92 U. S. 259, 268 (23 L. Ed. 543). If a statute by its necessary operation really and substantially burdens the interstate business of a foreign corporation seeking to do business in a state, or imposes a tax on its property outside of such state, then it is unconstitutional and void, although the state Legislature may not have intended to enact an invalid statute."

And so in the case at bar, while it may not have been the intention of the Railroad Commission by the order of September 21, 1910, made expressly applicable only to intrastate rates, to burden or affect directly or otherwise the interstate rates of the Southern Pacific Company as applicable to the same traffic, the necessary result of such order and the reduction required thereby as applied to the interstate commerce of the Southern Pacific Company is to burden and interfere with that commerce, and to destroy all interstate traffic in these commodities, unless the Southern Pacific Company submits to the reduction made and applies a corresponding reduction to all business of this class moving upon an interstate haul. It may not change the interstate rate to Portland as a basing point, whether the traffic moves by water or by competitive lines, or over its own rail lines, because the rates to Portland from other points outside of the State of Oregon are controlled by conditions over which the Southern Pacific Company has no control, and with basing rate makes the rate from other interstate points to Oregon line points south of Portland necessarily adding a proportional rate from Portland to Oregon line points on this

traffic that will enable the carrier to retain its interstate business and not discriminate against points beyond the state seeking to originate and move traffic to Oregon line points south of Portland. The necessary effect of the enforcement of this order made by the Railroad Commission is to compel the Southern Pacific Company and all other carriers engaged in interstate commerce, to reduce their interstate rates from points outside of the State of Oregon line points on the Southern Pacific, so as to equalize the basing rate into Portland with the local rate from Portland to Oregon line points, or else lose the business to Portland and to Portland jobbers.

The order is a regulation of interstate commerce and interferes with such interstate commerce not as a *matter of law*, but because as a *matter of fact* the effect of the order is as claimed.

The question here is whether or not the local rates upon this traffic moving from Portland to Oregon line points so affects the interstate rate on the same traffic and the interstate business of the Southern Pacific Company, as that the reduction made by the Railroad Commission upon this traffic makes the rate on the interstate

haul for the same traffic, or else compels the carrier to lose its interstate business.

The sufficiency of the complaint to present these questions cannot be doubted. Paragraph IX of the bill of complaint, (Record, pages 26 to 33) reads:

That the Union Pacific Railroad Company owns and operates a line of railroad extending from Union Pacific Transfer, in Council Bluffs, Iowa, to Granger in the State of Wyoming, and the Oregon Short Line Railroad Company owns and operates a line of railroad extending from Granger in the State of Wyoming to Huntington in the State of Oregon, and, extending from Union Pacific Transfer east to Chicago, and having physical connection with the line of the Union Pacific Railroad Company are various lines of railroad owned and operated by the Chicago & Northwestern Railroad Company, the Chicago, Rock Island & Pacific Railway Company and the Chicago, Milwaukee & St. Paul Railway Company. At Granger, Wyoming, there is a physical connection between the line of the Union Pacific Railroad Company and that of the Oregon Short Line Railroad Company, and at Huntington, Oregon, there is a physical connection between the line of the Oregon Short

Line Railroad Company and that of the Oregon Railroad & Navigation Company, which latter company handles interstate commerce into Portland and East Portland. That because of such physical connections and of the through tariffs published and established by the various companies parties thereto, merchandise and commodities of all kinds have moved from Chicago, Milwaukee, Duluth, St. Paul, Minneapolis, St. Louis and points and places located upon and east of the Missouri River, to Portland, in the State of Oregon. That the Northern Pacific Railway Company is a common carrier engaged in interstate commerce between Duluth and St. Paul, and Portland, Seattle and Tacoma, with physical rail connection into the City of Portland. That the Spokane, Portland & Seattle Railway Company, together with its connections with the Great Northern Railway Company at Spokane, Washington, has a physical, all-rail connection into Portland, and is engaged, with its connecting lines, in moving, under its published through tariffs, merchandise and commodities of all kinds, from Chicago, Milwaukee, Duluth, St. Paul, Minneapolis, St. Louis, and other eastern shipping points in other states of the United States, to Portland, Oregon.

That Southern Pacific Company, your orator, with its connecting carriers, is engaged in interstate commerce as a common carrier for hire, from New Orleans, La., Ogden, Utah, El Paso, Texas, Los Angeles, San Francisco, and other points in the State of California, with all-rail connection into the City of Portland, State of Oregon, at East Portland, and is engaged from time to time in moving, according to rates of through tariffs published and established by said company and its connecting lines, interstate commerce consisting of merchandise and commodities of all kinds, from these interstate points in other states than the State of Oregon, to Portland and East Portland, in said State of Oregon, and that all of said railroad companies having through published tariffs, so engaged in interstate commerce, are engaged in the movement of said interstate commerce not only to Portland and East Portland from all said points in said other states, but to all points on the lines of Southern Pacific Company in Oregon, applying to such shipment the local rates in effect and attempted to be modified by said pretended order hereinbefore set out. That all said interstate traffic handled by Southern Pacific Company, or subject to movement over its lines in Oregon, is ma-

terially affected by ocean competition on all traffic moving out of Los Angeles, and San Francisco, California, and other Bay points, in the State of California as well as interior points in the State of California, carrying a local rate sufficient to induce movement to ocean points, which said competition extends to transportation of interstate commerce from said points to Portland and East Portland, Oregon, and all points on the lines of Southern Pacific Company in Oregon, and that the reduction of said class rates so attempted to be effected by the said order directly and immediately affects the movement of all said interstate traffic.

That the tariffs filed with the Interstate Commerce Commission, as required by the said Act of Congress approved February 4, 1887, entitled, "An Act to Regulate Commerce," and the various amendments thereto and supplements thereof, and particularly said act of June 18, 1910, that prescribe the rates under which said interstate commerce is moved to Portland and East Portland and all points upon lines in Oregon of your orator Southern Pacific Company, are as follows:

Transcontinental Freight Bureau, West Bound, Tariff 4-H, I. C. C. 928, effective October 10, 1910.

Transcontinental Freight Bureau, East Bound, Tariff 2-H, I. C. C. 930, effective October 10, 1910.

Transcontinental Freight Bureau, Competitive Local and Joint Freight Tariff, West Bound, 5-F, I. C. C. 918, effective April 1, 1910.

Southern Pacific Company (Pacific System and Oregon Lines), Local and Joint Freight Tariff No. 161, I. C. C. 3021, effective July 1, 1908.

Southern Pacific Company (Pacific System and Oregon Lines), Local Joint and Proportional Freight Tariff No. 162-B, I. C. C. No. 3367, effective September 11, 1910.

Southern Pacific Company (Pacific System and Oregon Lines), Local and Joint Freight Tariff No. 418, I. C. C. No. 3090, effective January 1, 1909.

Southern Pacific Company (Pacific System and Oregon Lines), Local and Joint Freight Tariff No. 203-A, I. C. C. No. 3209, effective July 6, 1909.

Southern Pacific Company (Pacific System and Oregon Lines), Local and Joint Freight Tariff No. 576-A, I. C. C. No. 3313, effective January 23, 1910.

Southern Pacific Company (Pacific System and Oregon Lines), Local and Joint

Freight Tariff No. 577, I. C. C. No. 3350, effective September 24, 1909.

Southern Pacific Company (Pacific System and Oregon Lines), Local and Joint Freight Tariff No. 578–A, I. C. C. No. 3297, effective December 17, 1909.

Southern Pacific Company (Pacific System and Oregon Lines), Local and Joint Freight Tariff No. 579, I. C. C. No. 3252, effective September 24, 1909.

Southern Pacific Company (Pacific System and Oregon Lines), Local and Joint Freight Tariff No. 580, I. C. C. No. 3253, effective September 24, 1909.

Southern Pacific Company (Pacific System and Oregon Lines), Local, Joint and Proportional Freight Tariff No. 464, I. C. C. No. 3339, effective June 12, 1910.

That Southern Pacific Company, Lines in Oregon, Local and Joint Freight Tariff No. 235–A, naming class and commodity rates for transportation of freight between Portland, East Portland, Portland (Jefferson Street), Oregon, and points on lines of Southern Pacific Company in Oregon, governed, except as otherwise provided in Tariff and as amended, by The Western Classification No. 47 (F. O. Becker, Agent, I. C. C. No. 5), supplements thereto and

reissues thereof, which said rates are attempted to be reduced by the Commission's order No. F-125, is duly filed with the Interstate Commerce Commission, bearing I. C. C. No. 3265, thereby prescribing the use of these said rates on all interstate traffic moving through Portland and destined to points on the Southern Pacific Company, Lines in Oregon, which said tariffs are duly filed with the Interstate Commerce Commission as required by law, together with tariffs on all interstate commerce moved by all transcontinental railroads aforesaid, moving into Portland and East Portland, Oregon, and carrying interstate traffic destined to points at Portland and East Portland, and on the lines of Southern Pacific Company in Oregon; all of which said tariffs so filed as aforesaid are required to be observed by law. And your orators pray that your Honors will take judicial notice of all said tariffs so filed with the Interstate Commerce Commission, as aforesaid, to which reference is here made as if the same were fully written herein or made a part of this bill of complaint by exhibit or otherwise, and which your orators cannot more fully set out in this bill of complaint without encumbering the record.

And your orators specifically allege and show that the tariffs listed, Southern Pacific Company (Pacific System, Lines in Oregon), Local and Joint Freight Tariffs, hereinbefore set out, show through class and commodity rates from a large number of shipping points in the State of California on the Line of Southern Pacific Company, to all points in Oregon on the lines of Southern Pacific Company in Oregon, which said rates are made up by using the ocean competitive rate from San Francisco and other Bay points, to Portland, adding thereto the local class rates out of Portland and East Portland to points on the lines of Southern Pacific Company in Oregon, and that any reduction of existing class rates, attempted as in said order of said Railroad Commission, hereinbefore set out, directly, immediately and materially affects, changes and alters the said rates on said interstate shipments, thereby reducing said interstate rates to the extent of the said attempted reduction of the said class rates so attempted to be ordered into effect by said order F-125. That the said order F-125, so attempted to be made as aforesaid, if put into effect, will materially and directly affect all interstate freight traffic of your orators or all other common carriers moving

traffic to Portland and East Portland, and to points on the line of Southern Pacific Company in Oregon, and therefore your orators further allege and show that to comply with the said order aforesaid, so attempted to be made by the said Railroad Commission, reducing class rates from Portland to points on the line of Southern Pacific Company in Oregon, would naturally affect and reduce interstate rates.

And your orators would illustrate and specifically set forth and show that class rates from Portland south, covered by said order, are enabling rates on traffic originating beyond Portland, and form a portion of the through rate on said traffic having origin beyond the boundaries of the State of Oregon, and destined to points on Southern Pacific Company, Lines in Oregon, and that there is but one exception in the application of class rates from Northern California points south of Marysville, to Southern Oregon points, and with this exception, all traffic subject to application of class rates, originating in California south of Marysville, and in every other state of the United States, destined to points on the Southern Pacific Company, Lines in Oregon, is transported at through rates obtained by adding to the rate

applying to Portland, the class rate from Portland to destination.

Some of the tariffs filed with the Interstate Commerce Commission, applicable to said interstate business of your carriers, provide rates on traffic destined to points on the Southern Pacific Company, Lines in Oregon, specifically authorize the addition of class rates from Portland to destination, over established routes which do not require that the traffic be transported through Portland, namely:

Transcontinental Freight Bureau, West Bound, Tariff No. 4-H, I.C.C. No. 918, naming local and joint class rates, governed (see exception 2, page 2) by Western Classification No. 48 (I.C.C. No. 6 of F.O. Becker, Agent), supplements thereto or reissues thereof, and Local, Joint and Proportional Commodity Rates from Eastern shipping points designated on pages 2 to 15 inclusive, to "North Pacific Coast Terminals" designated on page 16, and points in Oregon and Washington, designated on pages 17 to 19, and 23 to 28 inclusive, effective October 10, 1929, which tariff, on page 16, provides bases for through rates to points named along the Southern Pacific Company, Lines in Oregon, and names the present class rates now in effect

as arbitraries to be added to the class or commodity rates applying to Portland, and also designates the gateways or routes over which the traffic shall move, to-wit:

"Will apply only via Gateways 32-A, 36, 41-A, 41-B, 41-C, 44 or 66, as shown on pages 30 to 34, inclusive," and the gateways referred to are as follows:

32-A. Northern Pacific Ry. to Wallula, Wash., Oregon Railroad & Navigation Co. to Portland, Ore., Southern Pacific Co. (Lines in Oregon) to destination.

36. Northern Pacific Ry. to Portland, Ore., thence Southern Pacific Co. (Lines in Oregon) to destination.

41-A. Union Pacific R. R., Granger, Wyo., Oregon Short Line R. R., Huntington, Ore., Oregon Railroad & Navigation Co., Portland, Ore., thence Southern Pacific Co. (Lines in Oregon) to destination.

41-B. Chicago, Rock Island & Pacific Ry. to Pullman, Colo., Union Pacific R. R., Granger, Wyo., Oregon Short Line R. R., Huntington, Ore., Oregon Railroad & Navigation Co. to Portland, Ore., thence Southern Pacific Co. (Lines in Oregon) to destination.

41-C. Chicago, Burlington & Quincy R. R., or Atchison, Topeka & Santa Fe. Ry. to

Denver, Colo., Union Pacific R. R., Granger, Wyo., Oregon Short Line R. R., Huntington, Ore., Oregon Railroad & Navigation Co. to Portland, Ore., thence Southern Pacific Co. (Lines in Oregon) to destination.

44. Union Pacific R. R., or Chicago, Burlington & Quincy R. R. to Denver, Colo., or Chicago, Rock Island & Pacific Ry. to Denver, Colorado Springs or Pueblo, Colo., in connection with Denver & Rio Grande R. R. to Salt Lake City, Utah, Oregon Short Line R. R. to Huntington, Ore., Oregon Railroad & Navigation Co. to Portland Ore., thence Southern Pacific Co. (Lines in Oregon) to destination,

or

Union Pacific R. R., or Chicago, Burlington & Quincy R. R. to Denver, Colo., or Chicago, Rock Island & Pacific Ry. to Denver, Colorado Springs or Pueblo, Colo., in connection with Colorado Midland Ry. and Denver & Rio Grande R. R. to Salt Lake City, Utah, Oregon Short Line R. R. to Huntington, Ore., Oregon Railroad & Navigation Co. to Portland, Ore., thence Southern Pacific Co. (Lines in Oregon) to destination.

66. Via El Paso, Tex., or Deming, N. M., or via Bakersfield, Fresno or Stockton, Cal.,

thence via Southern Pacific Co. (Pacific System and Lines in Oregon).

And it is also provided on page 26 of said tariff, as follows:

> N. B.—(Applies only on traffic routed via Gateway 66 designated on page 34). When no specific through rate or specific method of making through rate, to intermediate points on line of Southern Pacific Co., named on pages 24 and 25, is provided, the rate to such intermediate points will be made by adding to the Terminal rate shown as applying to the points designated as "Terminals," viz.: Portland or East Portland, Ore., whichever is nearest point of destination of shipment, the local rate published for use upon Interstate traffic from such nearest "Terminal" point named to point of destination.

And therefore your orators allege and show that the through interstate rate from Eastern shipping points to points on Southern Pacific Company, Lines in Oregon, except as otherwise provided, are made by adding to the terminal rates shown as applying to the points designated as terminals, by way of Portland or East Portland, Oregon, the local rate published for use

upon interstate traffic, which said local rates are present class rates from such terminal points named, viz.: Portland and East Portland, to points of destination, and such interstate traffic may be transported from said Eastern points to destination by way of El Paso, Texas, or Deming, New Mexico, or via Bakersfield, Cal., Fresno, Cal., or Stockton, Cal., thence via Southern Pacific Company, Pacific System, Lines in Oregon, and as illustrating such movement, your orators show that the present through rates on syrup from New York City, New York, to Eugene, Oregon, are made by adding to the terminal rates shown in Transcontinental Freight Bureau, West Bound, Tariff No. 4-H, as aforesaid, namely, $1.25 per 100 lbs. less than carloads, and $0.85 per 100 lbs. carloads, the local class rates governed by Western Classification No. 48, from Portland or East Portland to Eugene, of $0.36 per 100 lbs. less than carloads, and $0.33 per 100 lbs. carloads, making through rates of $1.61 per 100 lbs. less than carloads, and $1.18 per 100 lbs. carloads. And shipments may move via any one of the routes designated as 32-A, 36, 41-A, 41-B, 41-C, 44, or 66. And your orators show and allege that the effect of

the said pretended order of the said Railroad Commission, F–125, if put into effect on the through interstate rate on syrup from New York to Eugene, would reduce the less than carload rate from $1.61 per 100 lbs. to $1.53 per 100 lbs., and reduce the carload rate from $1.18 per 100 lbs. to $1.08 per 100 lbs. by reducing the local rates published for use upon interstate traffic from Portland and East Portland to Eugene, from $0.36 per 100 lbs. less than carloads, and $0.33 per 100 lbs. carloads, to $0.28 less than carload and $0.23 per 100 lbs. carload, respectively.

And your orators would further show and allege by way of illustration of the effect of the said pretended order of said Railroad Commission, if allowed to go into effect as applied to interstate rates, that interstate traffic is moved under Southern Pacific Company (Pacific System, and Oregon Lines) Local, Joint and Proportional Freight Tariff No. 162–B, I. C. C. No. 3367, which names local, joint and proportional class and commodity rates between San Francisco, Oakland, Oakland Wharf, Stockton, San Jose, Marysville, Sacramento, and other points in California and Nevada on lines of Southern Pacific Company, Pacific System, and Portland,

Oregon, East Portland, and other points in Oregon on lines of Southern Pacific Company, which ariff was effective September 11, 1910, and on file- with the Interstate Commerce Commission, which said tariff must be observed by your orators and their connecting carriers affected thereby, and is an interstate tariff naming through rates from San Francisco and points named, to points on Southern Pacific Company, Lines in Oregon, using competitive ocean rates to Portland and East Portland, plus class rates from Portland and East Portland to destination.

And your orators pray that the court will take judicial notice and knowledge of the said tariff last hereinabove described, as if the same were fully written herein and made a part of this bill of complaint.

And your orators allege and show that in the third column of said tariff is shown the basing rate to Portland, Ore. (Park St.) to be used only for basing purposes in conjunction with rates to points south of Portland (Park St.) Ore., shown on pages 60 to 64 inclusive, except as otherwise provided, and that the rates shown on pages 60 to 64 inclusive are present class rates from Portland, Oregon, to all points on Southern Pacific Company Lines in Oregon, except to points

competitive with Willamette River steamers, such as Salem, Independence, Albany and Corvallis. The class rates shown are one cent per 100 lbs. lower than regularly published class rates from Portland and East Portland, to Salem, Independence, Albany and Corvallis. And therefore, your orators show and allege, that taking the rates on syrup for example, the present rates from San Francisco to Eugene are $0.71 per 100 lbs. less than carload, and $0.44¼ per 100 lbs. carloads, which are made by combining on Portland, using the ocean rate San Francisco to Portland, plus the local class rates Portland to Eugene, and therefore your orators aver and allege that the effect of the Commission's order F–125 would be to reduce the less than carload rate on syrup from San Francisco to Eugene, from $0.71 per 100 lbs. to $0.63 per 100 lbs., and to reduce the carload rate on syrup from $0.44¼ per 100 lbs. to $0.34¼ per 100 lbs., a reduction in the carload rate of 23 per cent, notwithstanding that rail service involves a haul of 648 miles from San Francisco to Eugene.

Your orators would further show and allege that there is a Southern Pacific Company (Pacific System and Oregon Lines) Local Freight

Tariff No. 161, I. C. C. No. 3021, naming class rates for transportation of freight between San Francisco, Oakland, Stockton, San Jose, Niles, Sacramento and Marysville, Cal., also other points on lines of the Southern Pacific Company in California, as shown therein,—and Portland and East Portland and other points on lines of the Southern Pacific Company in Oregon, as shown therein, effective July 1st, 1908, which said tariff your orators pray that the court will take judicial knowledge and notice of, as if the same were fully written herein, and which said tariff contains the names of over 200 stations in California, from which direct through class rates apply to points on Southern Pacific Company, Lines in Oregon. All of which class rates, except as between Northern California and Southern Oregon points, are made by combining on San Francisco and Portland, using the low ocean rates between San Francisco and Portland to make the through rate from point of origin to point of destination, and that in addition to the interstate tariffs heretofore mentioned, your orators particularly show tariff called Southern Pacific Company (Pacific System and Oregon Lines) Local and Joint Freight Tariffs No. 577, I. C. C. No. 3250, effective September

24, 1909, naming rates for transportation of sugar from San Francisco, Oakland, San Jose, Sacramento, Stockton, and 200 other points in California on lines of Southern Pacific Company, to Portland, East Portland, Oregon, and other points in Oregon on lines of Southern Pacific Company, and that thereby also direct through rates are shown in this tariff from point of origin to point of destination, and are made by adding to the ocean rates from San Francisco to Portland, the class rates from Portland to destination.

Your orators also allege and show that there is a Southern Pacific Co. (Pacific System and Oregon Lines) Local and Joint Freight Tariff No. 578–A, I. C. C. No. 3297, effective September 17, 1909, naming rates for transportation of same from San Francisco, Oakland, San Jose, Stockton, Sacramento, and 200 other points in California on lines of Southern Pacific Company, to Portland, East Portland, Oregon, and other points in Oregon on lines of Southern Pacific Company, which said tariff is duly filed with the Interstate Commerce Commission, and of which your orators pray that the court may take judicial notice and knowledge, as if the same were fully written herein; and by which tariff direct through rates from point of origin to point of

destination are shown, which are likewise made by adding to the ocean rates from San Francisco to Portland, the class rates from Portland to destination.

Paragraph XV of the bill of complaint, (Record, Page 45) makes the following allegation:

> "Said Railroad Commission Act is void and of no force and effect in this: that it violates Article I, Section 8, paragraph 3, of the Constitution of the United States, which provides: "Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes," and is violative of Article I, Section 18, of the Constitution of the United States, which provides: 'Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof,' and particularly in this: that the said act of the Legislative Assembly of the State of Oregon attempts to confer upon the Railroad Commission of Oregon jurisdiction over interstate commerce, and does not limit its power

and authority to commerce wholly within the State of Oregon; and particularly, further, in this, that the said Railroad Commission Act necessarily attempts to and does confer upon the said Railroad Commission authority and power to take into consideration, in determining and fixing any rate for the carriage of freight or passengers upon the lines of your orators within the State of Oregon, the earnings of the said complainants derived from interstate traffic.

"Said order so attempted to be made as aforesaid, on September 21, 1910, is void and of no force and effect, in this: that said order, if enforced, would violate Article I, Section 8, paragraph 3, of the Constitution of the United States, hereinbefore set out, and would violate Article I, Section 18, of the Constitution of the United States, hereinbefore set out, and would be in conflict with the Act of February 4, 1887, entitled, "An Act to regulate commerce,' and the amendments thereto, and particularly the "Act to regulate commerce' as amended June 18, 1910, in this, that the said order directly, materially and substantially affects the rates upon practically all the interstate shipments of your orators."

Conceding these allegations to be true, as the demurrers do, the rates established by the order

of September 21, 1910, are clearly in violation of the Interstate Commerce clause of the Federal Constitution, and the Interstate Commerce Act.

II.

Since Congress conferred authority upon the Interstate Commerce Commission to determine and prescribe just and reasonable rates to be charged by common carriers engaged in interstate commerce, the power of the State under a State Railroad Commission Act to prescribe just and reasonable rates for intrastate commerce, is by necessary implication withdrawn, although Congress has expressly provided that the provisions of the amended Interstate Commerce Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property wholly within one state, etc. That is to say, the exercise of the constitutional power of Congress to create a commission with authority to determine and prescribe just and reasonable rates to be charged upon interstate commerce by carrier *engaged in both kinds of commerce, at the same time, of necessity is inconsistent* with the continuance of the

power of the states to create commissions with power to determine and prescribe rates for commerce wholly within the state, upon the principle that the exercise of the rate-making power by two jurisdictions over the same instrumentality of commerce, is legally and necessarily impossible. The interstate commerce carrier operates the property as a unit, in the movement of all its traffic, whether interstate or intrastate, and the earnings of that property are necessarily derived from the operation of the property as a unit. It is fundamental that the laws of the states must yield to the acts of Congress passed in the execution of the power to regulate commerce conferred upon it by the Constitution.

N. Y., N. H. etc. R. Co. v. New York, 165 U. S. 628.
Sinnot v. Davenport, 22 How. 227.
Smith v. Alabama, 124 U. S. 465.
Connolly v. Union Sewer Pipe Co., 184 U. S. 558.
Jacobson v. Massachusetts, 197 U.S. 25.
Pittsburg etc. Coal Co. v. Bates, 156 U.S. 577.
Hopkins v. United States, 171 U.S. 594.
Lottery Cases, 188 U. S. 321.

Greene v. Slaughter, 15 Peters, 449.
Passenger Cases, 7 Howard, 555.
Pittsburg Coa. Mining Co. v. Pennsylvania, 125 U. S. 181.
Rosewater v. C. & N. W. Ry. Co., 125 U. S. 465.
Leisy v. Hardin, 135 U. S. 119.
Robbins v. Tax Dist. of Shelby County, 120 U. S. 489.
Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.
Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204.
Austin v. Tennessee, 179 U. S. 343.
Mo., Kansas & Texas Ry. v. Haber, 169 U. S. 613.
Cardwell v. American Bridge Co., 113 U. S. 205.
Crandall v. Nevada, 6 Wall. 35.
Gibbons v. Ogden, 9 Wheat. 1.
Gulf, Colo. & Santa Fe Ry. v. Hefley, 158 U. S. 98.
Southern Railway Co. v. United States, 222 U. S. 20.

The cases we have cited under this point do not discuss the direct question under consideration. It was first determined by this court in *Cincinnati, New Orleans & Texas Pacific R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, that

under the Interstate Commerce Act prior to the amendment of 1906, the Interstate Commerce Commission had no power to prescribe rates which should control in the future. This case was followed in *Interstate Commerce Commission v. Railway Company*, 167 U. S. 479, where the question was re-examined and the doctrine firmly established that the legislative power of prescribing rates, either maximum or minimum, or absolute, had not been conferred upon the Interstate Commerce Commission. This construction of the Interstate Commerce Act has been steadily followed by this court.

Interstate Commerce Commission v. Alabama etc. Ry. Co., 168 U. S. 144.

Interstate Commerce Commission v. Baird, 194 U. S. 25, 42.

Texas & Pacific R. Co. v. Oil Company, 204 U. S. 426.

Interstate Commerce Commission v. Chicago G. W. Ry., 209 U. S. 108.

Prentis v. Atlantic Coast Line, 211 U. S. 210, 226.

Honolulu R. T. Co. v. Hawaii, 211 U. S. 282, 291.

Siler v. Louisville & Nashville R. Co., 213 U. S. 175, 194.

The amendment of 1906 gave to the Commission express power to determine, after hearing on complaint, what are reasonable rates for the future, and to require the observance of such rates. (*Missouri, Kansas, etc. R. Co. v. I. C. C.*, 164 Fed. 645) Prior to the amendment of 1906, the Commission did not have the power to prescribe through routes and rates, and to compel connecting lines to enter into through traffic arrangements, although the Commission had power to pass upon the reasonableness of through rates. The Hepburn Act took effect June 29, 1906, and by Section 15 of that Act the Commission was given power to fix a reasonable maximum rate.

The "Act to Regulate Commerce" as amended June 1910, in unmistakable terms places carriers engaged in interstate commerce under the jurisdiction of the Interstate Commerce Commission, but expressly provides that the act does not apply to transportation wholly within one state. The power to prescribe just and reasonable rates and classifications to be observed as maximum charges is found in Section 15 of the Act of June 18, 1910, 36 Statutes at Large, 539–551.

It is respectfully submitted that the effect of these Acts of Congress as thus amended, is to

place all carriers engaged in interstate commerce under the jurisdiction of the Interstate Commerce Commission, in and so far as interstate rates are concerned, and to withdraw from the jurisdiction of the state commissions the power to prescribe rates for the movement of intrastate commerce, leaving *that* commerce to be affected as an incident to the commerce, that is within the jurisdiction of the Interstate Commerce Commission by the provisions of the Interstate Commerce Act. If Congress had by express statute, in the exercise of its power to regulate interstate commerce, authorized the Interstate Commerce Commission, as an incident to its general powers over interstate commerce, to prescribe just and reasonable maximum rates for domestic commerce, or for that commerce which moves wholly within a state, there is no reason why such exercise of power should not, upon principle, exclude the police power of the state in respect to the same commerce or traffic. When Congress therefore assumed to confer upon the Interstate Commerce Commission power to prescribe maximum rates for all interstate commerce *moved by a carrier engaged in that business*, and declared by the same statute that the power thus conferred should not cover or embrace domestic commerce, or commerce

moving wholly within a state, by necessary legislative intendment Congress declared in legal effect that, as the greater exceeds the less, the power to prescribe interstate rates for interstate commerce, should operate to withdraw from the states respectively, and should also exclude from the power of the Interstate Commerce Commission, the right to prescribe rates upon domestic or intrastate commerce.

The reasoning of the court in *Southern Railway v. United States, supra*, as applied to a car engaged in the movement of intrastate or domestic commerce, is persuasive of the power of Congress, under the commerce clause of the Constitution, to create a commission with full and exclusive jurisdiction over a common carrier engaged in interstate commerce, and using an instrumentality in the movement of that commerce even though that instrumentality be at the time moving purely domestic or intrastate commerce.

In order to sustain the power of the state commissions to prescribe reasonable maximum rates for traffic moving wholly within the state, over a road engaged in interstate commerce, and to determine whether or not such rates, as thus prescribed by a state commission, are confiscatory or are reasonable or unreasonable, the entire

traffic of the carrier, both state and interstate, including its entire earnings and the value of the plant or unit, necessarily must be considered; and, under the doctrine of *Smyth v. Ames*, 169 U. S. 466, the state commission, although having before it a unit of a particular value as such unit, is not permitted to base rates affecting purely state traffic, upon the earnings received from interstate traffic. The reasonableness or unreasonableness of rates thus prescribed by a state for the transportation of persons and property wholly within its limits, must be determined without reference to the interstate business done by the carrier, or to the profits derived from that business. It was there held that the state could not justify unreasonably low rates for domestic transportation, considered alone upon the ground that the carrier was earning large profits on its interstate business, over which, so far as the rates were concerned, the state had no control, and that the carrier could not justify unreasonably high rates on domestic business, upon the ground that it would be able only in that way to meet losses on its interstate business.

It is respectfully submitted that the conclusion arrived at by the court in *Smyth v. Ames*, *supra*, was the only logical conclusion that could be found in the situation as it then existed. At

that time Congress did not assume to exercise its power under the commerce clause of the Constitution, to give the rate-making power to the Interstate Commerce Commission, affecting this same unit of property, this same carrier engaged both in interstate and intrastate business. Under this doctrine it has become necessary to take a great interstate railroad, whose local rates in a state are under consideration or review, either before a state railroad commission, or in the courts, and after ascertaining by expert testimony the value of the entire property from which income is to be obtained, and which is devoted to both intra and interstate commerce, and apportion to capital account that portion of its plant which is theoretically supposed to be engaged in earning an income on its interstate business; and by the same process, ascertain the value of that portion of its plant which should be assigned to the capital account engaged in the movement of purely domestic commerce.

The report of Judge OTIS made to the United States Circuit Court for the District of Minnesota, in *Shepard v. Northern Pacific Railway Company et al., supra*, describes the elaborate and intricate system under which the property of the railroads under consideration were divided into capital account so as to ascertain the proportion of the total

value of the property devoted to freight and passenger business, state and interstate. It became necessary in that case to ascertain the gross revenue from state and interstate business, both freight and passenger, separately stated; the relation of revenue per ton per mile, and per passenger per mile, respectively, state or interstate; the gross cost of operation, covering and being an aggregation of cost of state and interstate business, freight and passenger, and the division of cost between the freight and passenger business. Expert testimony was offered to show relative cost of the movement of interstate freight business as compared with the cost of movement of intrastate freight business. There was testimony in that case to the effect that it costs from three to seven times as much per ton per mile to do the intrastate freight business, as to do the interstate freight business, and that it costs from 25% to 50% per passenger per mile more to do the state passenger business, than to do the intrastate passenger business. The Master found from the weight of the testimony that the cost per ton per mile of doing state freight business was at least two and one-half times as much as was such cost in doing interstate freight business, in Minnesota, and that the testimony would have been ample to sustain a finding that

such relation of cost was as three to one. It then became necessary to divide the operating expenses, and to relate these operating expenses in a proper division between intrastate and interstate. An elaborate mathematical problem worked out the result. It was also necessary to make a division of total passenger operating expenses between intrastate passenger and interstate passenger; there was an apportionment of taxes to various classes of business, and there was an apportionment of other income to various classes of business, on the gross earnings basis; there was a net income applicable to return upon valuation of property, apportioned to the various classes of business, and an elaborate table was worked out upon the basis of earnings, operating expenses, miscellaneous income, and taxes, and a division of these operating expenses, between intrastate traffic and interstate traffic, both freight and passenger.

It is respectfully submitted that it is illogical and unsound to take a property which consists of a single unit, operating throughout a number of states, moving interstate traffic in the same train with intrastate traffic, both freight and passenger, using the same conductors, brakemen, engines, firemen, and other employees; using the same instrumentalities and appliances, and

then give to the Interstate Commerce Commission power to regulate rates, or to prescribe reasonable rates for all that traffic that moves from one state to another, and at the same time leave in the respective states power to prescribe reasonable rates for the movement of domestic commerce in the same train, moved by the same instrumentality and the same agencies, and the same employes. When the state alone exercised the rate-making power, through their commissions, it became a necessity to adopt the rule announced in *Smyth v. Ames*, *supra*, because the power of the state did not extend to the regulation of traffic that was interstate, or that was within the jurisdiction of Congress, under the commerce clause of the Constitution. There was no power of regulation of rates as to this proportion of the total business, in any other tribunal, at that time. Now, under the amended Interstate Commerce Act, Congress has assumed to control the rate-making power as to a large proportion of the business of every such carrier, and to assume exclusive control of the rate-making power as to all interstate commerce, both freight and passenger. Under these circumstances, how can it be said that the states may assume to take the same instrumentality, the same

capital invested in this great plant, and apportion, subdivide, and cut up the property into imaginary or approximately accurate proportions of capital invested, devoted to earning by its intrastate rates, a reasonable return upon such capital? It may be said that if this police power of the states is thus automatically withdrawn because Congress has exercised its power under the commerce clause of the Federal Constitution, to regulate interstate rates, there would be a vast body of traffic over which no tribunal would have control. This was true from the time of the enactment of the original Interstate Commerce Act of February 4, 1887, down to the passage of the Hepburn Act in 1906, as applicable to all interstate commerce. That is a mere question of expediency, not a question of power.

We therefore earnestly and strongly insist that the exercise by Congress of its constitutional power to regulate interstate commerce, and the creation of the Interstate Commerce Commission, with authority to prescribe maximum reasonable rates, excludes the power of the states as to an integral and inseparable part of the total commerce moved by these interstate carriers, and that purely domestic or intrastate

commerce is thereby withdrawn from the jurisdiction and control of the states.

In *Gibbons v. Ogden*, 9 Wheat, 1, the question was whether the legislation of the State of New York granting to Robert R. Livingston and Robert Fulton the exclusive navigation of all the waters within the jurisdiction of that state, with boats moved by fire or steam, for a term of years, was repugnant to the commerce clause of the Constitution; that is, whether the words, "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," comprehended navigation. It has been truly stated that "commerce" as the word is used in the Constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word in its application to foreign nations, it must carry this same meaning throughout the sentence, and remain a unit unless there is some plain, intelligible cause which alters it. The subject to which the power is next applied is to commerce "among the several states." The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the states cannot stop at the external boundary

line of each state, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and *which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary.* Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a state.

This is the language of the court on March 2, 1824, at a time when there was no amount of commerce of any kind by rail, and at a time when no railroad carried merchandise over a con-

tinuous line from one state to another, or as now through many states, across a continent. Chief Justice MARSHALL says at p. 4:

> "The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

It is, as it seems to us, a misapprehension of the true meaning of the word commerce in its relation to the nation, or to the people who comprise the nation, and who are engaged in commercial intercourse, to limit the term by the words "interstate" or "intrastate," or to attempt to modify its general character by state lines or words which would indicate that this com-

merce, consisting of a unit which is moved by a carrier over a continuous line operated throughout the states, and which may be co-extensive with the boundaries of the nation, should be subject to regulation by any political subdivision which might assume to prescribe rules for the movement of traffic by a carrier whose traffic was wholly domestic, and which had no relations, directly or indirectly, to the general movement of interstate commerce, if such a condition can be conceived under modern economic and commercial conditions. Commerce comprehends intercourse for the purposes of trade in any and all its terms, including the transportation, purchase, sale, and exchange of commodities between the citizens or subjects of other countries, and between the citizens of different states. *McNaughton v. McGirl*, 20 Mont., 124; 38 L. R. A., 367; 63 Am. State Rep., 610, citing *Welton v. State of Missouri*, 91 U. S., 275, and *County of Mobile v. Kimball*, 102 U. S., 691. For a discussion of the meaning of the word "commerce," and for convenient reference, we cite the following cases:

State v. Schlitz Brewing Co., 104 Tenn., 715.

Fuller v. C. & N. W. Ry. Co., 31 Iowa, 187.

Passenger Cases, 7 Howard, 283.

Brennan v. Titusville, 153 U. S., 289.
C. & N. W. Ry. Co. v. Fuller, 17 Wall., 560.
Gloucester Ferry Co. v. Pennsylvania, 114 U. S., 196.
Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S., 1.

In the case last cited Mr. Chief Justice WAITE, speaking for the court, says at p. 9:

> "Since the case of *Gibbons v. Ogden* (9 Wheat., 1) it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government.
>
> "The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat

to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation.

"The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of inter-communication, but especially is it so in commercial transactions. * * * Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and inter-communication comes within the controlling power of Congress, certainly as against hostile State legislation."

What is there said with reference to the electric telegraph, can be applied to the great inter-

state or transcontinental railways that today are the active instrumentalities in the movement of commerce of all kinds, making it possible for that close commercial intercourse between the individuals of the various states which was impossible prior to their construction. This great interstate highway thus engaged as an instrumentality in the movement of this commerce, and by Act of Congress expressly within its jurisdiction, ought not to be dismembered because in some of its trains there may be moved a volume of traffic or a portion of that commerce which is taken up and laid down wholly within the territorial boundary of a particular state. The commerce of the country is a single entity; it is for commercial purposes, and, for the purpose of control under the commerce clause of the Constitution, subject only to a single controlling agency, and is incapable of subdivision so as to be placed within the control of a multitude of separate jurisdictions, and especially where, as now, by the supreme law of the land the control of the major portion of what is technically called interstate commerce is specifically vested in a tribunal created by Congress.

In *Southern Railway Co. v. United States*, 222

U. S. 20, Mr. Justice VAN DEVANTER, speaking for the court, says:

> "Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge; both classes of traffic are at times carried in the same car and when this is not the case, the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen, and like employees, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent, for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains."

In determining the question whether the Safety Appliance Acts were within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving interstate traffic, but

embrace vehicles used in moving intrastate traffic, the court says:

> "The answer to this question depends upon another, which is,—is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intrastate traffic and the object which the acts obviously are designed to attain, namely, the safety of interstate commerce and of those who are employed in its movement? Or, stating it in another way,—is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is so, not because Congress possesses any power to regular intrastate commerce as such, but because its power to regulate interstate commerce is plenary and competently may be exerted to secure the safety of the persons and property transported

therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce."

While this language is used with reference to an instrumentality owned by an intrastate railroad, but at the time moving an interstate car, it recognizes the unity of the business in which such carrier was engaged, and the unity of the instrumentality used in the movement of all traffic or commerce carried by the road. So in like manner, when Congress assumed the power under the commerce clause to control and prescribe, through its tribunal created for that purpose, reasonable maximum rates for which such traffic is to be moved, it necessarily excluded the power of the states to legislate as to any portion of that total commerce, although Congress itself did not grant to the commission any jurisdiction over purely internal or intrastate commerce. The exercise of the larger power is inconsistent with the exercise of the lesser power by any other tribunal than that created by Congress.

The traffic of any carrier engaged in interstate

commerce is not necessarily moved in one set of cars carrying only intrastate traffic, another set of cars carrying only interstate traffic. Even if the trains were so made up and operated as that only intrastate traffic moved in intrastate trains, and interstate traffic moved in interstate trains, this physical separation of the traffic would not destroy the unity of the commercial intercourse between the citizens of the United States, or the unity of the business of the carrier as a whole, or the entirety of the invested capital, or the single and indivisible enterprise in which that capital is invested, or the close and necessary relation of the total traffic of all kinds to each and every part of that traffic. All commerce is a unit in the industrial world, and the division into intra and interstate is purely geographical, and not economic, political, or commercial.

The earning power of a great interstate railroad depends upon the rates prescribed upon which the whole traffic moves, and the revenues go into a common fund to discharge operating expenses that are incurred as a whole, and to pay a reasonable return upon the entire investment as a complete and operated interstate highway. Let us illustrate the concrete case. A train of twenty freight cars is moved from Chicago to Portland, carrying merchandise upon

an interstate rate. This merchandise reaches Portland, carried over a single and continuous line, owned by a railroad company engaged in interstate commerce, and its line likewise extends through Portland to points south thereof, within the state. The rates from Portland south, to points within the state, are said to be within the jurisdiction of the State Railroad Commission, because the traffic has been picked up and laid down wholly within the territorial boundaries of the state. This train of twenty or more cars, if billed through from Chicago to Medford, Oregon, via Portland, moves interstate traffic, and the rates to be prescribed and the instrumentalities used are all within the jurisdiction of Congress. If the train stops at Portland, and makes delivery of its freight to the Portland jobber, the jurisdiction remains. If, however, the freight is rebilled, without unloading, and delivery to a siding is accepted by the consignee, and the freight is rebilled to Medford, the freight ceases to be interstate commerce, and thereby becomes domestic or local commerce, having regard to geographical lines, and having regard not to the nature of the commerce represented by the goods, but having regard to the place where the shipment originates, and where it ends. If the cars

are unloaded at Portland, warehoused in bulk or otherwise, or placed in a store and mingled with the goods of a local merchant, and these identical goods are shipped to Medford next day, in the same identical train, the goods become domestic or intrastate commerce, and the rates to be charged for the shipment come within the jurisdiction of the state. Is it possible for the freight charge upon the goods moved from Chicago, via Portland, to Medford, to be any more than the sum of the charge from Chicago to Portland and that from Portland to Medford, whether the charges respectively are made by the carrier or are made or prescribed by the State Railroad Commission, or by the Interstate Commerce Commission? If the charge is made less by the State Commission, from Portland to Medford, than the proportion of the total charge from Chicago to Medford, via Portland, must it not necessarily follow that the interstate rate from Chicago to Medford must be reduced, or else the carrier lose the traffic in favor of Portland, as against Chicago? Suppose the carrier, instead of having twenty or more cars in this train, all consigned from Chicago to Portland or Medford, respectively, should have half of these cars consigned to Portland, the other half to Medford, each carrying the same kind of merchandise,

and the first half are unloaded at Portland, and the merchandise enters into the channels of trade, burdened with a specific rate charged to Portland. The remaining ten cars are moved to Medford upon a through rate, which is greater than the rate from Chicago to Portland, with the local rate added on the same traffic, from Portland to Medford. The effect commercially would be that the merchandise unloaded from the first half of the train would move to Medford under the laws of commerce or trade, and competing with the same merchandise that had moved direct, and if the disparity of rates caused by state action was great enough to overcome the extra cost of handling the traffic thus unloaded at Portland, the commerce moving locally from Portland to Medford would exclude the traffic moving from Chicago to Medford direct. This is so, not because this total traffic, in the first instance, crossed state lines, and half of it came to rest at Portland, and acquired a situs for some state or local purpose, such as for the purpose of taxation, but because of the regulation of the state as to this identical article of general trade and commerce, these local rates would control the movement of the same article of commerce that otherwise would have moved under the jurisdic-

tion of the Interstate Commerce Commission, and such commerce did in fact move over the identical railroad from Chicago to Portland; and it was only because the interstate carriage into Portland, as to a portion of this traffic, that the state assumed to prescribe the rate for its further movement locally to Medford. The carrier thus affected either loses its business in part, or else delivers it under rates prescribed by separate and independent jurisdictions, each tribunal attempting to exercise power effective to reduce or increase the earnings of the entire road as a single property.

Rate regulation as to all the traffic of an interstate carrier can only be effective when exercised by one authority. How can the interstate railroad operating from New York to Portland, crossing many states, and subject to the jurisdiction of the Interstate Commerce Commission as to all traffic that moves physically from one state into other states, be at the same time subject to the jurisdiction of as many state railroad commissions as there are states across which this great highway is located and operated? How can the commerce or traffic moved by this interstate carrier—it may be in the same trains, that happens to be taken up and laid down

wholly within a state—be said to be so segregated and completely local in its character, as related to the property, and as related to the power to fix the rates, as to be within the jurisdiction of a state, after Congress has undertaken to prescribe the rates for all the remaining commerce moved, which is, as we may know, the larger or major portion of the great body of traffic that freely moves among our people. The rates made upon the traffic moved, whether such traffic be technically intrastate or interstate, fix the earning power of the property, and that earning power is not based upon each segregation of the mileage local to any one of these states. There can be no division or distribution of the power to make rates to be charged for the use of this entire property, without theoretical and possible actual dismemberment of a great highway into as many highways as are co-extensive with the territory over which the rate-making body has jurisdiction. Commerce knows no state lines. Whether the traffic moved is a carload of freight or a car full of people, each class of traffic, whether at the moment destined to a point beyond the state where the traffic originated, is a part of that great industrial and commercial traffic that moves according to economic laws, and

makes it possible for this great highway to be operated and maintained as a unit. The tax or burden placed upon that traffic, as the reasonable charge for its movement, when fixed by the rate-making power, must of necessity be determined and fixed either by the carrier or by the tribunal whose powers are co-extensive with the properties affected, and there cannot well be independent tribunals who may subdivide the property, segregate its values, and fix the earning power of an undivided and indivisible portion of the entire railroad, based upon a divided traffic, divided operating expenses and earnings, and at the same time another tribunal assuming to fix the earning power of that portion of this entire railroad devoted to traffic of another kind, dividing operating expenses and earnings upon some theoretical basis of relatively invested capital and related expense of operation, and net earnings as to that capital. The supreme and controlling power to prescribe rates and determine the earning power of the property, should be that tribunal whose jurisdiction is co-extensive with all the property, all the operating expenses, and all the earnings, as well as all the traffic, and when that tribunal is granted the power as to an indivisible portion of such

traffic, and such tribunal speaks under the warrant of the Constitution, it must follow that other tribunals having jurisdiction theretofore over some portion of the total traffic which may originate and be moved wholly within a state, must yield.

There is nothing revolutionary in this view, nor is there anything inconsistent with the great powers reserved to Congress by the Constitution, under the commerce clause. Whether Congress shall assume to prescribe the charge for commerce that is moved wholly within a state, by an interstate carrier, is a question of policy and not of power. When Congress assumed to exercise its supreme power over this great highway, as to the traffic technically known as interstate, it necessarily excluded the power of any other tribunal to fix or affect the earning power of the property as a whole.

Mr. Haines, in his work "*Restrictive Railway Legislation*," at page 20, says:

> "The earliest charter for a railroad corporation seems to have been that of the Mohawk Valley Railroad Company, in 1825, but the earliest one for an interstate railroad was obtained by the Baltimore & Ohio Railroad Company from Maryland and Virginia,

in 1827 and 1828. The first charter granted by Massachusetts was that of the Boston & Lowell Railroad Company, in 1829."

Johnson in his work "*American Railway Transportation*," page 21, says:

> "The pioneer American railroad built for general public use was the Baltimore and Ohio. The company was chartered in 1827 and construction was begun in 1828, but not on a large scale, there being only 13 miles open for traffic in 1830. Five years later the length of the road was 135 miles. The first rail of this historic road was laid on July 4, 1828, by Charles Carroll, the only living signer of the Declaration of Independence. As Professor Hadley, writing in 1885, stated: 'One man's life formed the connecting link between the political revolution of the last century and the industrial revolution of the present.'"

There were only 23 miles of railroad in the United States in 1830. There were 196,346 miles in 1900, and 239,052.28 miles in 1910. The Act of Congress on the 15th of June, 1866, 14 Statutes 66 was a recognition of the growth of the interstate railway, and may be well called "The Charter of the American Railway System." See

Railroad Co. vs. Richmond, 19 Wall., 584. *Union Pacific R. Co. vs. Chicago etc. R. Co.*, 163 U. S. 589. *Bowman vs. C. & N. W. R. Co.*, 125 U. S. 465.

All of this indicates the marvelous growth of the movement of commerce, and the extension of the agencies engaged in that movement under the control of the power of Congress.

While it was unnecessary to pass upon and decide this question in *ex parte Young*, 209 U. S. 123, Mr. Justice PECKHAM, in the course of the opinion in that case, speaking on this subject, says at p. 145:

> "Still another federal question is urged, growing out of the assertion that the laws are, by their necessary effect, an interference with and a regulation of interstate commerce, the grounds for which assertion it is not now necessary to enlarge upon. The question is not, at any rate, frivolous."

It will be noticed that the language there used had reference to the contention that the laws of the State of Minnesota, by their necessary effect interfered with and constituted a regulation of interstate commerce, while the contention made in the case at bar is that the order of September 21,

1910, necessarily and directly affects the interstate commerce of the complainants, and that the order in its practical operation became an effective and controlling regulation of interstate commerce and that the order was therefore void and not within the power or authority of the Oregon Railroad Commission.

It may be that in a case of this kind where, under a valid state law, intrastate rates are sought to be regulated and fixed by the state through its Commission or other administrative body, and where such order when made operates upon the interstate commerce of the carrier whose rates are thus affected so as to directly regulate and control such interstate rates and limit, regulate and control such interstate commerce of such carrier in such commodities, that under existing laws there is an apparent want of authority to regulate and determine or fix such intrastate rates.

It is clear that if there is a conflict between the assertion of power by the United States through the Interstate Commerce Commission and the power of the state through its Railroad Commission, the latter must yield, and it may be that existing legislation does not provide for a practical adjustment of rates thus affected.

Such was the situation in the case of *E. E. Saunders & Co. v. Southern Express Co.*, 18 I. C. C. Rep. 415.

Speaking upon this subject in that case, as applied to the particular facts, Harlan, Commissioner, says at p. 423:

> "By a readjustment of the state rates out of Mobile, whether so intended or not, the process of taking from Pensacola, through lower state-made transportation charges, what its superior zeal or its greater natural advantages have given to it has commenced and is now going on.
>
> "The defendant is one concern and one instrument of commerce operating through and across those invisible lines that separate the several states from one another. It has but one corps of officers and employees and but one equipment. Its only object is to serve all the shippers in the territory through which it passes. That object is legitimately effected only when it serves its whole constituent public upon substantially similar terms when the conditions are substantially similar. If it voluntarily makes a distinction between traffic that moves from a point in one state to a point in another state and traffic that moves between points in the same state, and

gives to the state traffic lower rates than to the interstate traffic moving under substantially similar conditions it imposes upon the latter a burden that it ought not justly to bear, and it discriminates against one community in favor of another. The same burden and discrimination follow if instead of voluntarily so adjusting its rates it is compelled so to adjust them by the action of a state commission. It may be that this anomaly in transportation necessarily results from our dual system of government and that a remedy is beyond reach without some amendment to the national constitution. On principle it is clear that a carrier operating through two or more states is but one vehicle of commerce, and all traffic moved by it, whether state or interstate, ought, when the general transportation conditions are the same, to bear its just proportion of the cost of operation and ought to yield no more and no less than its just proportion of the revenues of the carrier. Any other theory is fundamentally inequitable, illogical and unreasonable. It may be, but on that point we express no opinion, that the Congress may constitutionally protect interstate commerce, as well as the carriers that are engaged in interstate transportation, by requiring that any state traffic

moved by such a carrier shall bear its just proportion of the cost of operation and yield its proper proportion of profit to the carrier; and that with such an end in view it may authorize this Commission to fix minimum rates, at least, for state traffic when moved by carriers engaged also in interstate transportation; or that it may provide that no carrier engaged in the interstate transportation of passengers or property may at the same time carry state traffic at rates that are less than the rates exacted by it for interstate carriage of like distance and under like transportation conditions. It has, however, not attempted any such legislation, and whether such an enactment would stand the test of scrutiny by the courts under the constitution as it now stands, and if so, whether it would be desirable from the standpoint of a broad public policy, are questions that must ultimately be determined by the legislative power and therefore cannot profitably be discussed by the Commission in this proceeding."

III.

The bill of complaint states facts sufficient to show that the order of September 21, 1910, if put into effect, would deprive the complainants of a just and fair return upon the value of their property. The complainants are entitled to enjoin any reduction in the earnings of these properties which would deprive them of a reasonable return or just compensation for the use of their properties, based upon their present values to be ascertained by competent proof. Any reduction which would deprive complainants of such reasonable return or just compensation is confiscation *pro tanto* and constitutes a taking of their properties without due process of law, in violation of the Fourteenth Amendment. The power to regulate and fix reasonable rates cannot be exercised so as to destroy all net earnings or so as to require railroad companies to serve the public without reasonable or any compensation.

Beale & Wyman, on Railroad Rate Regulations, sections 312, 351, 352, 382, 383, 384, 385, 386, 387, 388, 1331, 1332, 1333, 1334.

Smyth v. Ames, 169 U. S. 466; s. c. 171 U. S, 361, 365.

San Diego Land & Town Co. v. National City, 174 U. S. 739.

Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362.

Chicago, Milwaukee etc. Ry. Co. v. Tompkins, 176 U. S. 167.

Minneapolis & St. L. Ry. Co. v. Minnesota, 186 U. S. 257.

San Diego Land & Town Co. v. Jasper, 189 U. S. 439.

Stanislaus County & San Joaquin, etc. Co., 192 U. S. 201.

Dow v. Beidelman, 125 U. S. 680.

St. L. & S. F. Ry. Co. v. Gill, 156 U. S. 649.

Covington & Lexington T. R. Co. v. Sanford, 164 U. S. 596.

Cotting v. Kansas City S. Y. Co., 183 U. S. 79.

Railroad Commission Cases, 116 U. S. 307.

Chicago & G. T. Ry. Co. v. Wellman, 143 U. S. 339.

See also notes to Sections 1331, 1332, 1333, 1334 of *Beale & Wyman on Railroad Rate Regulation.*

City of Knoxville v. Knoxville Water Co., 212 U. S. 1.

Willcox v. Consolidated Gas Co., 212 U. S. 19.

Ex parte Young, 209 U. S. 123.
Hunter v. Wood, 209 U. S. 205.
Siler v. Louisville etc. Ry. Co., 213 U. S. 175.
Chicago etc. Ry. Co. v. Minnesota, 134 U. S. 418, 459.
In re Arkansas Railroad Rates, 163 Fed. 141.
M. K. & T. Ry. Co. v. Love, 177 Fed. 493.
Atchison, T. & S. F. Ry. Co. v. Love, 174 Fed. 59.

The importance of the question involved may justify some reference to the fundamental rules which control the courts in cases of this kind.

The question for consideration is whether the bill of complaint states facts sufficient to show that the order of September 21, 1910, if put into effect, would deprive the complainants of a just and fair return upon the value of their property. If so, the demurrer, of course, should be overruled on this branch of the case.

The complainants are entitled to enjoin any reduction in the earnings of these properties which would deprive them of a reasonable return or just compensation for their use based upon their present values to be ascertained by competent proof, and the values stated in

the bill of complaint must be taken to be the true values of the property entitled to reasonable and fair return. Any reduction which would deprive the complainants of such reasonable return or just compensation would be confiscation to that extent and a taking of the properties without due process of law in violation of the Fourteenth Amendment.

Conceding the power to regulate and fix reasonable rates, it is charged that the enforcement of the rates promulgated by the order of September 21, 1910, would deprive the complainants of the return to which they are entitled. This power to regulate and fix reasonable rates cannot be so exercised as to destroy all net earnings or require railroad companies to serve the public without reasonable or just compensation.

A determination of this question does not necessarily involve the reasonableness of a particular rate or schedule, as a rate or schedule which, when taken with all the other earnings of the property leaves no return or any reasonable return, as stated by Beale & Wyman in their excellent work, *Railroad Rate Regulation*, Section 312:

> "The carrier is entitled, first, to pay all expenses; which would include both the

actual expenses of operation and also certain annual charges that must be paid before any real profit can be realized. He is entitled furthermore to gain a fair profit on his capital invested. The determination of the actual amount of the capital invested may be a matter of some difficulty; once determined, the rate of profit upon that amount of capital is a question which will be determined, generally speaking, by the ordinary business profit of the time and place."

The bill of complaint alleges that the value of this property is $43,594,886.73 (See Record, p. 3).

The bill of complaint shows that under existing tariffs, which are alleged to be reasonable, there has never been any sum realized from net earnings over and above the payment of fixed charges and operating expenses that could be distributed in payment of dividends upon the capital stock.

The bill of complaint shows that the fixed charges referred to are annual interest charged at five per cent per annum on an outstanding bond issue of $17,745,000.00, leaving the balance of invested capital consisting of $19,000,000.00 of capital stock and the sum of $6,849,886.73 invested in addition thereto, making the total value of the property $43,594,886.73. This is based

upon the total valuation stated in paragraph IV of the bill of complaint. If you take the valuation stated as representing the outstanding bonded indebtedness, deficit and capital stock, that sum is $39,952,008.37, and the allegation is there made that the properties have never at any time yielded any net income applicable to the payment of dividends upon the capital stock or any part thereof. Assuming these allegations of fact to be true, as we must for the purposes of the demurrer, it then follows that a reduction of any sum under the order of September 21, 1910, could not be compelled and there is no question but that the reduction alleged to result from the enforcement of this order, on intrastate and interstate business, amounts to $156,072.48 annually.

Beale & Wyman, further speaking upon this subject, say:

> "It must be borne in mind that the problem presented to a court which is asked to set aside an established rate as unconstitutional because it amounts to a confiscation of property is not precisely the same problem as that presented to a court which is asked to pass upon the fairness of a rate established by a railroad or other public service company. If a statutory rate takes

property, the property affected by it is not the original investment, but the property actually existent and owned by the company. If it is a taking of property to deprive the owner of a fair return upon it, the return must be unfair as income derived from that actual property. In determining whether the return allowed to the railroad is a fair return on their property, the property is that actually in use, at its present value. Where, however, the question is whether the company is exacting too great a return on its investment by means of an unfair schedule the question is as to the amount actually and *bona fide* invested. Justifying legislative rates therefore is one thing, and holding that unreasonable charges are not being made is quite another matter."

We may say that this language used by the learned authors concerns the power to set aside a statutory rate but the same principle underlies a suit to annul or set aside an order made by a Railroad Commission fixing charges which causes a reduction of net earnings upon the whole property when the net earnings as thus reduced do not permit the railroad company to receive a reasonable return on the value of the property devoted to the public service. In any such case the reasonableness of the rate set aside

and the reasonableness of the rate promulgated is only incidentally involved so far as the question of the reasonableness of such rate in and of itself is concerned. The inquiry into its reasonableness from the aspect under consideration is confined to the question whether the reduction thereby effected deprives the railroad company of a reasonable return when the entire earnings of the properties are considered. In the determination of that question all other rates and schedules in effect by the order are presumably reasonable, but in the case at bar the complaint alleges them to be reasonable, so that it follows that the reduction under consideration directly presents the question whether it is confiscatory. That is, whether it is depriving the railroad company of its right to a just and fair return upon its capital invested, and if it appears from the bill of complaint that the railroad company, even under the rates as they were before the order of September 21, 1910, went into effect, was not receiving and did not receive from all of its earnings anything out of which it could pay any return or dividend upon its capital stock, which in this case represents less than one-half of the value of the property, then a clear case of confiscation is stated under the authorities.

In *Smyth v. Ames*, 169 U. S. 466, Mr. Justice HARLAN, speaking for the court in an opinion to which there was no dissent, says, p. 522:

> "What amounts to deprivation of property without due process of law or what is a denial of the equal protection of the laws is often difficult to determine, especially where the question relates to the property of a quasi-public corporation and the extent to which it may be subjected to public control. But this court, speaking by Chief Justice WAITE, has said that, while a state has power to fix the charges by railroad Companies for the transportation of persons and property within its own jurisdiction, unless restrained by valid contract, or unless what is done amounts to a regulation of foreign or interstate commerce, such power is not without limit; and that 'under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward, neither can it do that which in law amounts to the taking of private property for public use without just compensation, or without due process of law.' *Railroad Commission Cases*, 116 U. S. 307, 325, 331. This principle was recognized in *Dow v. Beidelman*, 125 U. S.

680, 689, and has been reaffirmed in other cases."

The court will recall that the case of *Smyth v. Ames* (169 U. S., 526) was a suit to set aside maximum freight rates prescribed by the statutes of the State of Nebraska, and the constitutionality of the statutes was directly involved and raised upon the facts stated, while in the case at bar the validity of the order of the Commission is involved and such order is directly attacked not because the Railroad Commission Act is invalid as to this branch of the case but because the order promulgates a set of rates and declares a reduction which would deprive the railroad company of earnings to which it is entitled to enable the railroad company to receive a just and fair return upon its property.

Speaking further upon this question, Mr. Justice HARLAN says at p. 526:

"In view of the adjudications these principles must be regarded as settled:

1. A railroad corporation is a person within the meaning of the Fourteenth Amendment declaring that no state shall deprive any person of property without due process of law, nor deny to any person

within its jurisdiction the equal protection of the laws.

2. A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States.

3. While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the state or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

Smyth v. Ames, 169 U. S., 526.

While the complaint here makes no segregation of the portion of capital invested devoted to

intrastate traffic or the portion of capital invested devoted to interstate traffic, the presumption is that the rates for interstate traffic are reasonable, inasmuch as these rates have not been disturbed by the Interstate Commerce Commission. Therefore it is immaterial for the purposes of the demurrer to the bill of complaint what proportion of this capital is devoted to the one kind of traffic or to the other, provided it appears from the complaint that the property, as a whole, will be deprived by the order of the Commission of a just and reasonable return upon the property. The state cannot contend or claim that the interstate earnings are excessive and therefore that the earnings on intrastate business can be and should be reduced, for in the last analysis the rates for intrastate business and the rates for interstate business must both be reasonable and the confiscatory character of such rates must be determined with reference to the returns realized therefrom upon that portion of the capital devoted to intrastate business and to interstate business respectively.

Mr. Justice BREWER, speaking upon this subject, in *Smyth v. Ames*, *supra*, page 541, says:

> "If we do not misapprehend counsel, their argument leads to the conclusion that

the State of Nebraska could legally require local freight business to be conducted even at an actual loss, if the company earned on its interstate business enough to give it just compensation in respect of its entire line and all its business, interstate and domestic. We cannot concur in this view. In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the state has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and prop-

> erty between points within the state that the state can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business."

It may be claimed by counsel for the defendants that the bill of complaint in the case at bar should have alleged in specific terms the proportion of capital engaged in intrastate business and the proportion engaged in interstate business, but it is respectfully submitted that the state is in no position to make this contention for the reason that the bill shows that the rates on intrastate business now in effect are reasonable and are as low as the cost of the service will permit, and for the further reason that it appears that the interstate rates are filed with the Interstate Commerce Commission, and are therefore presumed to be reasonable, and if so, the state has no right to consider or determine whether or not the earnings resulting from the application of these interstate rates are excessive, and the state has no right to take a portion of such earnings and place them to the credit of intrastate business so as to enable

the state to justify a reduction of rates on intrastate business when the total earnings, both intrastate and interstate, freight and passenger, leave no net earnings out of which a just and fair return upon any part of the property can be obtained. If the proofs should develop the fact that the intrastate earnings of the complainants yield a net income over and above payment of operating expenses which would permit a surplus from which a just and fair return would be received for the use of that portion of the property engaged in intrastate business, it then might be claimed that the particular rates promulgated by the order of September 21, 1910, were not confiscatory, but that follows from the proofs when the segregation of capital and earnings is made.

Beale & Wyman on *Railroad Rate Regulation*, Section 1331, say:

> "When a rate is fixed so low as to impair the earning power of the corporation and render it impossible to obtain a fair return upon its investment, the rate operates a confiscation of the property invested in the business, and is unconstitutional as depriving the company of its property without due process of law. As the rule is generally

expressed, an unreasonably low rate is an illegal rate, whether it is fixed by the legislature itself, or by a municipal corporation or board, or by a commission."

In *Covington and Lexington Turnpike Road Co. v. Sandford*, 164 U. S. 578, Mr. Justice HARLAN, speaking for the court, says at p. 591:

"We have then the case of a corporation invested by its charter with authority to construct and maintain a turnpike road, and to collect tolls 'agreeable' to certain named rates, and which is required by a subsequent legislative enactment to conform to a tariff of rates that is unjust and unreasonable, and prevents it, out of its receipts, from maintaining its road in proper condition for public use, or from earning any dividends whatever for stockholders. These facts are admitted by the demurrer. Is such legislation forbidden by the clause of the Constitution of the United States declaring that no state shall deprive any person of property without due process of law? We are of opinion that, taking, as we must do, the allegations of the answer to be true, this question must be answered in the affirmative.

"It is now settled that corporations are persons within the meaning of the consti-

tutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws. *Santa Clara County v. Southern Pacific Railway Co.*, 118 U. S. 394; *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 189; *Minneapolis & St. Louis Railway v. Beckwith*, 129 U. S. 26; *Charlotte &c. Railroad v. Gibbes*, 142 U. S. 386, 391. And as declared in *St. Louis & San Francisco Railway v. Gill*, 156 U. S. 649, 657, upon the authority of previous decisions, 'there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of the property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws,'—citing Railroad Commission Cases, 116 U. S. 307, 331; *Dow v. Beidelman*, 125 U. S. 681; *Chicago, Milwaukee &c. Railway v. Minnesota*, 134 U. S. 418; *Chicago & Grand Trunk Railway v. Wellman*, 143 U. S. 339; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362."

In *St. Louis and San Francisco Railway Co. v. Gill*, 156 U. S. 649, 657, Mr. Justice SHIRAS, speaking for the court, says at p. 657 :

> "This court has declared, in several cases, that there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws. *Railroad Commission Cases*, 116 U. S. 307, 331; *Dow v. Beidelman*, 125 U. S. 681; *Chicago, Milwaukee Etc. Railway Co. v. Minnesota*, 134 U. S. 418; *Chicago & Grand Trunk Ry. v. Wellman*, 143 U. S. 339; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S., 362."

In *San Diego Land Co v. National City*, 174 U. S. 739, Mr. Justice HARLAN, speaking for the court, says, 753 :

> "It is equally clear that this power could not be exercised arbitrarily and without ref-

erence to what was just and reasonable as between the public and those who appropriated water and supplied it for general use; for the State cannot by any of its agencies, legislative, executive or judicial, withhold from the owners of private property just compensation for its use. That would be a deprivation of property without due process of law. *Chicago, Burlington, etc. Railroad v. Chicago*, 166 U. S. 226; *Smyth v. Ames*, 169 U. S. 466, 524. * * * In view of these principles, can it be said that the rates in question are so unreasonable as to call for judicial interference in behalf of the appellant? Such a question is always an embarrassing one to a judicial tribunal, because it is primarily for the determination of the legislature or of some public agency designated by it. But when it is alleged that a state enactment invades or destroys rights secured by the Constitution of the United States a judical question arises, and the courts, Federal and State, must meet the issue, taking care always not to entrench upon the authority belonging to a different department, nor to disregard a statute unless it be unmistakably repugnant to the fundamental law.

"What elements are involved in the general inquiry as to the reasonableness of rates

established by law for the use of property by the public? This question received much consideration in *Smyth v. Ames*, above cited. That case, it is true, related to rates established by a statute of Nebraska for railroad companies doing business in that State. But the principles involved in such a case are applicable to the present case. It was there contended that a railroad company was entitled to exact such charges for transportation as would enable it at all times, not only to pay operating expenses, but to meet the interest regularly accruing upon all its outstanding obligations and justify a dividend upon all its stock; and that to prohibit it from maintaining rates or charges for transportation adequate to all those ends would be a deprivation of property without due process of law, and a denial of the equal protection of the laws."

In *Chicago, Milwaukee, etc. Ry. Co. v. Tompkins*, 176 U. S. 167, Mr. Justice BREWER, speaking for the court, says at p. 173:

"Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a state legislature for the carriage of passengers and freight are unreasonable. And yet this difficulty affords no excuse for a failure to examine

and solve the questions involved. * * * When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, state or nation, without any right of appeal to the courts, is one which cannot for a moment be tolerated. Difficult as are the questions involved in these cases, burdensome as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution. Railroad Commission cases, 116 U. S., 307; *Dow v. Beidelman*, 125 U. S. 680; *Georgia R. R. & Banking Co. v. Smith*, 128 U. S. 174; *Chicago, Milwaukee & St. Paul Ry. v. Minnesota*, 134 U. S. 418; *Chicago & Grand Trunk Ry. v. Wellman*, 143 U. S. 339; *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S. 362; *St. Louis & San Francisco Ry. v. Gill*, 156 U. S. 649; *Covington etc. Turnpike Co. v. Sandford*, 164 U. S. 578; *Smyth v. Ames*, 169 U. S. 466."

The latest expression of this court upon this subject is found in *City of Knoxville*

v. *Knoxville Water Company*, 212 U. S. 1, and in *Willcox et al. v. Consolidated Gas Company*, 212 U. S. 19. Speaking of the general question, Mr. Justice MOODY, in *Knoxville v. Water Company*, *supra*, says at p. 18:

> "The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind. Regulation of public service corporations, which perform their duties under conditions of necessary monopoly will occur with greater and greater frequency as time goes on. It is a delicate and dangerous function, and ought to be exercised with a keen sense of justice on the part of the regulating body, met by a frank disclosure on the part of the company to be regulated. The courts ought not to bear the whole burden of saving property from confiscation, though they will not be found wanting where the proof is clear. The legislatures and subordinate bodies to whom the legislative power has been delegated, ought to do their part. Our social system rests largely upon the sanctity of private property, and that State or community which seeks to invade it will soon discover the error in the disaster which follows. The slight gain to the consumer,

which he would obtain from a reduction in the rates charged by public service corporations, is as nothing compared with his share in the ruin which would be brought about by denying to private property its just reward, thus unsettling values and destroying confidence. On the other hand, the companies to be regulated will find it to their lasting interest to furnish freely the information upon which a just regulation can be based. If hereafter it shall appear, under the actual operation of the ordinance, that the returns allowed by it operate as a confiscation of property, nothing in this judgment will prevent another application to the courts of the United States or to the courts of the State of Tennessee."

In *Willcox v. Consolidated Gas Company* (212 U. S. 19), Mr. Justice PECKHAM, speaking for the court, says at p. 41:

"The question arising is as to the validity of the acts limiting the rates for gas to the prices therein stated. The rule by which to determine the question is pretty well established in this court. The rates must be plainly unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as under the circumstances is just both to the owner and the

public. There must be a fair return upon the reasonable value of the property at the time it is being used for the public. *San Diego Land Co. v. National City*, 174 U. S. 739, 757; *Same v. Jasper*, 189 U. S. 439, 442."

The precise question involved in the case at bar, upon a demurrer to the complaint, was ruled upon by the Circuit Court of Appeals for the Eighth Circuit, in *Wallace v. Arkansas Central R. Co.*, 118 Fed. 422, where, THAYER, Circuit Judge, speaking for the court, says at p. 424:

"It is obvious, we think, that no relief can be afforded to the appellants in this court, whether the action of the lower court upon the demurrer to the fifth and tenth paragraphs of the bill was erroneous or otherwise. Both the original and substituted bills contained a specific allegation that the tariff schedule which had been put in force by the commission, and made effective as of August 2, 1900, would reduce the complainant's earnings to such an extent as would amount to a taking of its property for public use without just compensation. It was averred in that paragraph of the bill that such would be the effect of the proposed schedule, because the income which the complainant was at the time deriving

from all sources, by the use of its property, was not sufficient, under the existing schedule of rates, to enable the company to pay its operating expenses, taxes, and fixed charges, and that the proposed schedule of rates would yield far less than the existing schedule. In view of the action taken by the defendants when their demurrer to the fifth and tenth paragraphs of the bill was overruled, these allegations stood confessed; and such being the case, the decree of the lower court was clearly right under repeated decisions of the supreme court of the United States holding that a state law or regulations establishing rates for the transportation of persons or property, such as will not admit of the carrier earning such a compensation as under all the circumstances of the case is just to it and to the public, operates to deprive the company of its property without due process of law, and to deny to it the equal protection of the law, in violation of the fourteenth amendment to the federal constitution. *Smyth v. Ames* 169 U. S. 466, 522, 523, 18 Sup. Ct. 418, 42 L. Ed. 819; *Reagan v. Trust Co.* 154 U. S. 362, 14 Sup. Ct. 418, 1047, 38 L. Ed. 1014."

In *Missouri, K. & T. R. Co. v. Interstate C. Commission*, 163 Fed. 645, the Circuit Court,

consisting of Judges VAN DEVANTER, HOOK, and ADAMS, upon an application for a preliminary injunction, say[s] 647:

> "Neither Congress nor any legislative or administrative board acting by its authorization can competently establish rates for the transportation of property in interstate commerce that will not admit of the carrier earning such compensation for the service rendered as under all the circumstances is just and reasonable to it and to the public, for that would be depriving the carrier of its property without due process of law, and would be taking its property for public use without just compensation, in violation of the fifth amendment to the Constitution."

While what is there said concerned the operation of rates prescribed by the Interstate Commerce Commission, the rule is equally applicable to rates promulgated by a state railroad commission, in so far as the question of confiscation is concerned.

In the case of *Missouri, K. & T. R. Co. v. Love*, 177 Fed. 493, the judgment of the court was invoked by an application for a temporary injunction, and the defendants showed cause by

demurrers to the bills of complaint. It was urged in that case that the bills of complaint were defective because they did not assail the freight rates separately, but the court there said that the bills disclosed the contrary, at least by express general allegations. The suit involved the validity of the two-cent per mile passenger rate prescribed by the Constitution of Oklahoma, and certain freight rates prescribed by the Corporation Commission of that state. Speaking upon the general subject, HOOK, Circuit Judge, says at p. 502:

> "The demurrers: It is argued that the freight and passenger rates are still in legislative process, and therefore within the doctrine of *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150, not properly the subject of judicial consideration. Both phases of this contention have already been considered in connection with the pleas. 174 Fed. 59. It is the law of the land that a state may not confine to its own courts a citizen who claims his rights under the Constitution of the United States have been denied. And the Supreme Court did not hold in the *Prentis Case* that a similar result could be accomplished by prescribing and enforcing

under penalties a legislative rule, even though tentative, and restricting the remedy of the citizen to subsequent legislative inquiry and action.

"It is also urged that the bills of complaint are defective because they do not assail the freight rates separately. But the bills disclose the contrary, at least by express general allegations. Moreover, the rates in question should properly be considered as a body and in connection with the other freight rates of the companies not affected by the orders. Though the orders, save three modifications, were made successively, at different times during the year 1908, the rates prescribed constitute as much a single body as if embraced in one order. They affect from 40 to 50 per cent. of the local freight business, and cause an average reduction of about 40 per cent. of the prior rates applied to the same amount of traffic. Presumably the Commission preserved a due relation among them so far as is practicable in such cases, and there is no contention that the rates left untouched are relatively as low. When all the local freight earnings are considered an insufficient net return is clearly disclosed, and there is no difficulty in locating the cause."

It does not appear whether the demurrers were overruled or not, but upon the proofs, temporary injunctions were granted.

In *Southern Pacific Company v. Interstate Commerce Commission*, 177 Fed. 963, ROSS, Circuit Judge, speaking for the Circuit Court, consisting of Judges GILBERT, ROSS, and MORROW, sitting *en banc*, says at p. 964:

> "It is well established law that the fixing of the rates to be charged by public service corporations is a legislative function, from which it necessarily follows that when Congress, as it did, conferred upon the Interstate Commerce Commission the power, in causes properly brought before it, to determine what are and should be reasonable rates to be charged by the carriers of interstate commerce, its action in the premises is conclusive upon the courts, subject of course always to the inhibitions of the Constitution of the United States, which protect such companies, like everybody else, against confiscatory rates."

What is there said, of course, must be considered in connection with the questions we shall presently discuss, that is, whether the Federal Court, in equity, can review a rate made by a railroad commission, to determine whether the

rate in and of itself is reasonable or unreasonable, where the state statute authorizes a judicial review, or whether a Federal Court in equity is limited to a judicial review that will merely inquire whether or not the rates reduced, in connection with the existing body of rates, are so unreasonably low as to allow insufficient net earnings out of which the railroad company should receive a just and reasonable return upon its property. We shall presently show, when that question is reached, that a Federal Court in equity must not only determine whether the reduction is confiscatory, and therefore unreasonable, but whether or not the rates promulgated are in and of themselves unreasonably low.

In *Portland Railway Light & Power Co. v. Railroad Commission of Oregon*, 109 Pac. 273, Ore., Mr. Justice SLATER, speaking for the court, says at p. 274:

> "The several principles of law stated in the argument are undoubtedly sound, and not to be questioned, but in applying the reasons of the law to the facts of the case, we fail to fully agree with counsel. The principles are that a corporation is a person within the meaning of the fourteenth amend-

ment, which forbids the state to deny to any person within its jurisdiction the equal protection of the laws, and prohibits the taking of property without due process of law; that the fixing and enforcement by a railroad commission of unjust and unreasonable rates for transportation by railroad companies is an unconstitutional denial of the equal protection of the laws; that a corporation cannot be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it; and that the requirements of the fourteenth amendment apply both to privileges conferred and liabilities imposed, and no greater burdens should be imposed upon one than are laid upon others in the same calling and condition."

In *State v. Central Vermont Ry. Co.*, 81 Vt., 463, Mr. Justice TYLER, speaking for the court, says at p. 466:

"It is equally well settled that it is within the power of a state legislature, with reference to commerce within the state, and of Congress, with reference to interstate commerce, to prescribe the rates to be charged by public carriers for their services, so long as the charges fixed do not require that the services rendered shall be without reasona-

ble compensation. *Smyth v. Ames*, 169 U. S., 466, 42 L. Ed., 819. But it is held that, though the power of the Legislature to prescribe the charges of a railroad company is beyond question, it is not an unlimited power. It is not a power to destroy or to compel the doing of a service without reward, or to take private property for public use without just compensation or without due process of law. *Budd v. New York*, 143 U. S., 517, 36 L. Ed., 247. See numerous cases cited in the opinion in *Smyth v. Ames*, 169 U. S., 523, 525, 42 L. Ed., 841; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S., 174, 32 L. Ed., 377; *Cleveland C. C. & St. L. R. Co. v. Closser*, (Ind.) 9 L. R. A., 754; *Louisville & N. R. Co. v. Com.*, 99 Ky., 132, 33 L. R. A., 209."

The bill of complaint shows that the receipts from all sources for the eight years ending June 30, 1909, were $42,578,133.33 and the disbursements for the same time were $41,389,493.35, leaving as net to apply on outstanding deficit for losses from operations previously sustained, only the sum of $1,188,639.98. It does not clearly appear, perhaps, from the pleadings whether the annual bond interest, on the $17,745,000 of outstanding bonds, was or is included in the total disbursements, or whether

the sums paid as annual taxes were so included, but construing the complaint more strongly against the pleader, and therefore, assuming that these annual sums were so included, the fact remains that on June 30, 1909, there was a deficit from operation, after applying all receipts, of $3,207,008.37 and that, during the whole period of the lease from July 1, 1887, to date, there was no sum earned available for dividends upon the stock, representing a value of $19,000,000, or disregarding the stock as such, no actual return, on the capital invested, other than that portion of the total $39,952,008.27 book value, or total of $43,594,886.73 actual value, admitted as alleged—other than annual interest on $17,745,000 thereof at 5 per cent, that is to say, the demurrer admits that complainants have $22,207,008.27 upon one basis, or $25,849,886.73 on the other basis, invested in the property, that for eight years has not earned any income. The excess of net earnings for any one year, even if shown to exist, cannot be used as a shield to protect the Commission from this confiscatory order.

Under the doctrine of *Knoxville v. Water Co.* and *Willcox v. Consolidated Gas Co.*, *supra*, the complainants are entitled to a just and reason-

able return upon their properties, and what is such return, is a question of fact, but it is fundamental that a Railroad Company is entitled to the same compensation for the use of its property and exactly the same return, as may be enjoyed by any other private property, based, of course, as a minimum upon the general return allowable to and earned by other property and business, in the country or locality served. In *Willcox v. Consolidated Gas Co.*, such return was not confiscatory, with a minimum of 6 per cent net. In *Shepard v. N. P. Railway Co.*, 184 Fed. 765–807, the return fixed as a minimum was 7 per cent. Any body of rates yielding a less return than 7 per cent upon railroad capital, taking into account the general situation and hazards, would be confiscatory. What is confiscation, is easily ascertained by this rule. Rates may remain reasonable with a much greater return than the minimum, but any reduction, compelled by the state which deprives the railroad company of the minimum net return —not upon bonded debt or stock—but upon the value of the entire investment—would be and is confiscation. Complainants are, therefore, entitled to a net return of not less than 7 per cent

upon $43,594,886.73 or upon $39,952,008.27 as the actual value may be found to be. It is thus seen that the order made, if enforced, is clearly confiscatory.

The averments of the bill of complaint intending to challenge the reasonableness of the particular schedule of rates promulgated by the order of September 21, 1910, are full and are sufficient to tender an issue of fact thereon.

That the rates promulgated are based upon the arbitrary approval of Class 1 now in effect and that the lower rates are made by an arbitrary spread between the class rates, coupled with the averment that the classification and spread and each thereof was so made and adopted arbitrarily and without any reference to the distance such traffic should be moved or the character of the traffic or the service to be performed or the compensation that should be paid therefor, raises a distinct issue of fact which challenges not only the reasonableness of the rates promulgated but the classification or relative rates between classes, and the demurrer therefore admits that the classification is capricious and not based upon any fair consideration.

It is also alleged in connection therewith that the largest decrease in these class rates in the

application of the arbitrary percentage takes place in Classes 4 and 5, and that under these classes groceries and hardware are largely moved, and that the decrease approximates twenty per cent of existing rates, and that this decrease will be largely of benefit to jobbers and dealers, who have made and are now making excessive profits under the existing class rates. No citation of authority is necessary to sustain the contention that such a rate based upon such a classification cannot be said to be reasonable.

IV.

The bill of complaint charges in specific, direct and apt terms that the rates promulgated by the order of September 21, 1910, are unreasonable and that the rates of the complainant, Southern Pacific Company, displaced by the Commission, as well as all other rates in effect at the date of the order, were and are reasonable, and that the particular rates displaced yielded but slight compensation above the cost of the service. (See paragraph X, pages 33–37 Record. See also subdivision "k" paragraph XV, page 46

Record. See paragraph XI, pages 37–39 Record, showing competitive conditions.)

What specific rate or schedule of rates shall be promulgated by a Commission or other rate making body or regulating tribunal effective in the future, is an administrative function. Whether such rate or schedule of rates is reasonable, in fact, is a judicial question—under general principles of law as well as under the express provisions of Sections 31, 32, 33, 34, and 35 of the Railroad Commission Act of February 18, 1907, being Sections 6909, 6910, 6911, 6912, 6913, Lord's Oregon Laws.

Shepard v. N. P. Ry. Co., 184 Fed. 765, 807;

Louisville & N. Ry. Co. v. I. C. C., 184 Fed. 118;

I. C. C. v. L. & N. Ry. Co., 190 U. S. 273;

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426;

Prentis v. Atlantic Coast Line, 211 U. S. 210;

I. C. C. v. N. P. Ry. Co., 216 U. S. 538;

I. C. C. v. Delaware, L. & W. R. Co., 216 U. S. 531;

I. C. C. v. Ill. Cen. R. Co., 215 U. S. 452;

Missouri, Kansas & Texas R. Co. v. I. C. C., 164 Fed. 645, 648;

Beale & Wyman on Railroad Rate Regulations, Sections 315, 317, 318, 319, 320, 321, 322, 323, 324, 325, 459, 460, 515, 517, 518, 519, 523, 524, 525, 526, 527, 528, 530, 531, 533, 534, 914, 915, 917, 918, 919, 920, 924, 925, 926, 927, 928, 932, and cases cited in the foot notes to each of these sections;

McGrew v. Railroad Co., 230 Mo. 496, 531;

Chicago, etc., R. Co. v. Minnesota, 134 U. S. 418;

Chicago, etc., R. Co. v. Wellman, 143 U. S. 339;

Reagan v. Trust Co., 154 U. S. 362;

St. Louis, etc., R. Co. v. Gill, 156 U. S. 649;

Covington T. P. Co. v. Sandford, 164 U. S. 578;

Smyth v. Ames, 169 U. S. 466;

San Diego Land Co. v. National City, 174 U. S. 739;

Cotting v. Stock Yards Co., 183 U. S. 79;

Stanislaus County v. San Joaquin County, 192 U. S. 201;

Ex parte Young, 209 U. S. 123;
Knoxville v. Knoxville Water Co., 212 U. S. 1;
Willcox v. Consolidated Gas Co., 212 U. S. 19;
Mo. K. & T. R. Co. v. Interstate Commerce Com., 164 Fed. 645;
Chicago, M., etc., Ry. Co. v. Tompkins, 176 U. S. 167;
Mo. K. & T. Ry. Co. v. Love, 177 Fed. 493;
Interstate Commerce Commission v. Chicago Ry. Co., 218 U. S. 88, 110;
Prentis v. Atlantic Coast Line, 211 U. S. 210, 224;
Central of Georgia Ry. Co. v. Railroad Commission, 161 Fed. 925, 964;
Louisville & N. R. Co. v. Brown, 123 Fed. 946, 948;
Interstate Commerce Commission v. Cincinnati, etc., Co., 167 U. S. 499;
Southern Pacific Co. v. Board of Railroad Commissioners, 78 Fed. 236;
Interstate Commerce Commission v. Chicago, G. W. Ry. Co., 141 Fed. 1003;
N. P. Ry. Co. v. Railroad Commission of Washington, 106 Pac. 611;

Southern Ry. Co. v. Atlanta Stove Works, 128 Ga. 207;

Railroad Commission v. Houston & Texas Central Ry. Co., 90 Tex. 340.

People v. Willcox, 194 N. Y. 383;

Matter of Village of Saratoga Springs v. Saratoga Gas etc., Co., 191 N. Y. 123;

M. St. P., etc., Co. v. Railroad Commission, 136 Wis. 146;

The State v. Railway Co., 76 Kan., 467;

Mich Cen. Ry. Co. v. Railroad Commission, 160 Mich. 355;

Mich. Cen. Ry. Co. v. Circuit Judge, 156 Mich. 459, 470;

Chicago B. & Q. R. Co. v. Jones, 149 Ill. 361;

Janvrin, petitioner, 174 Mass. 514, 517;

Commonwealth v. Atlantic Coast Line Ry. Co., 106 Va. 61.

Interstate Commerce Commission v. Baltimore & Ohio Ry. Co., 43 Fed. 37;

Ill. Cen. R. Co. v. Interstate Commerce Com., 206 U. S. 441.

V.

In addition to the allegation made in the bill of complaint that the rates promulgated by the order of September 21, 1910, are unreasonable, it is charged specifically that the order is void in that the reduction made thereby is based upon the arbitrary approval of Class 1, now in effect, and an arbitrary spread between the class rates, adopting the arbitraries of 100 per cent. for the first class, 85 per cent. of first class for second class, 70 per cent. of first class for third class, 60 per cent. of first class for fourth class, 50 per cent. of first class for fifth class, 50 per cent. of first class for Class A, 40 per cent. of first class for Class B, 30 per cent. of first class for Class C, 25 per cent. of first class for Class D, and 20 per cent. of first class for Class E, and that this arbitrary classification and spread, and each thereof, was so adopted by the Railroad Commission arbitrarily and without any reference to the distance such traffic should be moved, or the character or nature of the traffic, or the service to be performed, or the compensation that should be paid therefor, and that the classification is capricious and not based upon any fair consideration, and that under this arbitrary spread or

application of percentage of class rates, the largest reduction is effective at points on the line more difficult and expensive to operate by reason of mountain chains and physical difficulties (See sub. "k", Par. XV, Record, page 46). In this respect and to show the unreasonable character of the order in this respect, it is alleged that the largest decrease in these class rates affects Classes 4 and 5, and that under these classes, consisting of staples, groceries, and hardware particularly are moved largely, both intrastate and interstate, and that the decrease as to such commodities, under such classification attempted to be made by the order, approximates 20 per cent. of existing rates, and that this decrease will be largely if not wholly of benefit only to jobbers and dealers therein, and that said dealers and jobbers, during several years last past, have made and are now making large and excessive profits under existing class rates, and that this order if put into effect will still further increase these profits at the expense of complainants and of the public (See Par. X, p. 33-37 Record).

It is further alleged that existing local class rates supplanted by this order are reasonable

and just, and made as low as competitive conditions intrastate and interstate will permit or allow, and that the compensation charged is reasonable and just and affords but slight compensation above the cost of service, and that the decrease in revenues made by this order will, furthermore, have to be made up by increasing other rates upon traffic not affected by the order, particularly products of the soil, forest, and farm, many of which receive and enjoy terminal rates, including such commodities sold and consumed in the markets of the world, thereby compelling complainants to discriminate against these products, to the injury of complainants and to the public (See Par. X, p. 33–37 Record).

It therefore necessarily appears from these allegations that the reduction promulgated by the order of September 21, 1910, results from the arbitrary classification and spread made, and that this was so made without reference to the distance the traffic be moved, the nature or character of the traffic, service performed, or compensation that should be paid therefor, and that the classification is not only capricious, but is not based upon any fair consideration. Assuming that these allegations of fact are true, the

order is necessarily void, and the rates promulgated thereby cannot stand.

Interstate Commerce Commission v. Chicago etc. Co., 141 Fed. 1003.

Southern Pacific Co. v. Bartine, 170 Fed. 725, 742.

Chicago etc. R. Co. v. Iowa, 94 U. S. 155.

VI.

When a railroad corporation is chartered by a State, with the right to engage in the transportation of passengers and freight, and to collect and receive such rates therefor, as it may prescribe, the right to charge a reasonable rate or compensation, for the use of its property for such purpose by the public, is implied, and forms a part of its contract with the state, which cannot be impaired by legislation.

Section 21, Article I, of the Constitution of the State of Oregon.

Section 2, Article I, of the Constitution of the State of Oregon.

Section 10, Article I, of the Constitution of the United States.

Section 34, Act of the Legislature of Oregon, October 14, 1862.

Miller v. State, 15 Wall. 478.
C. B. & Q. R. Co. v. Iowa, 94 U. S. 155.
Shields v. Ohio, 95 U. S. 319.
Wells-Fargo Co. v. O. R. & N. Co., 15 Fed. 561.
Ex parte Koehler, 23 Fed. 529.
Cleveland Gas L. & Coke Co. v. City of Cleveland, 71 Fed. 610.
Ball v. Rutland Ry. Co., 93 Fed. 513.
Southern Indiana R. Co. v. R. R. Com., 172 Ind. 113.
Stone v. Y. & M. V. R. Co., 62 Miss. 607.
Pingree v. Michigan Cent. R. Co., 118 Mich. 314.
State v. S. P. Co., 23 Or. 424.

In the case of *Cleveland Gaslight & Coke Co. v. City of Cleveland*, 71 Fed. 610, JACKSON, Circuit Judge, said, at page 610:

> "In February, 1846, the legislature of Ohio, under constitutional authority, chartered the Cleveland Gaslight & Coke Company, with power and authority, the privilege, as we call it, to manufacture and sell gas within the city limits of Cleveland. It did provide, as all this class of legislation usually provides, that, before entering upon the streets of the city that were under the

control of the municipality for the purpose of laying down its pipes, its mains, and so on, it must get permission of the city. The city in due time gave its permission, and, having given its permission, and the company having laid down its pipes, the city, under well-established authorities, could not withdraw its consent. It becomes a fixed and vested right, under the terms and provisions of the charter, to manufacture and vend gas within the city limits of the city of Cleveland. That is clear, beyond a question. The constitution and laws of Ohio at that time reserved no power, either to repeal that charter or modify or alter or to change it in any respect. By the terms of the charter, there is necessarily imported in the right of the company, or necessarily implied, the right to charge a reasonable rate for all gas furnished, just as though that right had been expressed in the most positive terms in the charter itself. We read in that charter, therefore, the right inferred to make a reasonable charge for what it supplied to the city and the inhabitants of the city of Cleveland. There is no power in the aggregated sovereignty of Ohio to deal thereafter with that charter. The state had no power to deal with it, to abridge, curtail, or limit its powers, or to deprive it

of its franchises after it had accepted its charter and laid down its pipes. Neither the city nor the state itself, in its sovereignty, had any power thereafter to modify, change, or alter that charter right of the gas company. The constitution of 1851 was as invalid to affect that charter as any legislative act passed without reference to that constitution. The constitution of 1851, in providing that there should be the power to regulate, modify, alter, or change charters, necessarily referred to charters thereafter passed or thereafter granted. It is well settled, under the decisions, that, so far as the contract feature of a company's charter granted in 1846 is concerned, it would be as much beyond the power of a convention making a new constitution to affect it, as it would be beyond the power of the legislature to affect it. The whole sovereign people of Ohio, gathered together in convention, could not make a new constitution that would affect the rights of a corporation thus created in 1846.

"We come on down to an act of the legislature subsequent to the adoption of the constitution of 1851, an act which was passed after all the vested rights of this corporation had accrued, the date of which will be ascertained by a reference to the act, and which

was an act authorizing municipalities in which gas companies are located or doing business to fix the price at which the gas shall be sold. We find the Supreme Court of Ohio construing that act, saying, in substance, and in effect, that the price thus fixed by the municipal corporation is conclusive, unless it is attacked for fraud; that it may be attacked for fraud. We find then the municipal council of Cleveland fixing the rate of charge which this complainant shall make for its gas to consumers at 60 cents per thousand feet. The bill alleges distinctly, as a matter of fact, and not as inference of law, that it cannot manufacture and deliver gas at less than $1 per thousand feet, without loss, and that the city in fixing the price at 60 cents per thousand feet has fixed it at a price greatly less than that at which it can manufacture and deliver the gas. It claims that this is a taking of their private property without due process of law; and it alleges that this action was had without notice. These are all facts that we have to take as conceded by the demurrer.

"The question that now faces the court is whether a municipal corporation, itself a consumer of gas, as alleged in the bill, in its corporate relation to the company, to the extent of $5,000 or $6,000 per month, can,

under the legislative sanction conferred by Section 2478 of the Revised Statutes of Ohio, fix, or has the constitutional right to fix, the terms or price at which itself and all other consumers shall pay for the gas furnished. It would be a fearful proposition, monstrously absurd and outrageous, if the legislature were to undertake to confer upon a citizen of Cleveland the right to say at what price services should be rendered to him, or what he should pay for goods and articles furnished him. There is hardly any law in this land that would make the party being furnished the judge of the price that he should pay, or would say that his arbitrary decision should fix the rights of the parties. The city of Cleveland has undertaken to do that thing under this Section No. 2478, as disclosed by the bill. I am only dealing with the facts disclosed in the bill. She has undertaken to say that for the gas furnished to herself and to every consumer in this community, the complainant shall only have and receive 60 cents per 1000 feet, 40 per cent. less than complainant can manufacture gas and deliver it for. The complainant comes into this court, and in its bill, in substance and effect says three things; you are by that action impairing the obligation of a contract that was made in

1846 between ourselves and the sovereign state of Ohio; and that you cannot do that under the constitution of the United States, which is the paramount law of this land, and which prohibits any state from impairing the obligation of a contract, either doing so directly or through the instrumentality of a municipal corporation by delegated authority. The thing cannot be done and ought not to be done. If we reflect about it for a moment, we will see that those two features of the Constitution of the United States—the prohibition against the impairment of the obligation of contracts, and the interstate commerce clause of the Constitution; the protection of persons and property against arbitrary action upon the part of the states—are the very fundamental principles upon which the preservation of this government must rest."

VII.

The power of a state, reserved by its constitution, to alter, amend, or repeal, general laws concerning corporations, is subordinate to and limited by the provisions of the Federal Constitution, inhibiting laws impairing the obligations

of contracts, depriving persons or corporations of their property without due process of law, or denying the equal protection of the laws; rights acquired, and capital invested, by a corporation, or its stockholders, in the lawful exercise of power conferred by such laws, are within the protection of such constitutional provisions, and cannot be arbitrarily destroyed by subsequent state legislation.

Wells Fargo & Co. v. O. R. & N. Co., 8 Saw. 600.
Ex parte Koehler, 11 Saw. 37.
Ball v. Rutland R. Co., 93 Fed. 513.
San Joaquin & Kings R. Co. v. Stanislaus County, 113 Fed. 930.
Stone v. Y. & M. V. R. Co., 62 Miss. 607.
Pingree v. Mich. Cent. R. Co., 118 Mich. 314.
State v. S. P. Co., 23 Or. 424.

In the case of *Stone v. Y. & M. V. R. Co.*, 62 Miss. 607, CAMPBELL, Chief Justice, in the course of his opinion, at page 641 said:

> " Section 6 of the charter of the appellee confers on the company power to fix from time to time by its board of directors the rates at which it will transport persons or property over its railroads, provided they

shall not exceed a maximum specified in the act.

"The power to contract is an essential attribute of sovereignty and is of prime importance. Its exercise has been productive of incalculable benefits to society, however great may be the evils incident to its injudicious employment. It cannot be denied merely because of its liability to abuse. The power to contract implies the power to make a valid contract. Chartering railroad companies and other similar associations has long been an acknowledged and a favorite exercise of legislative authority. The right to grant charters includes the right to grant such as will be upheld. Conferring power on the grantee of the franchise to fix rates of compensation at discretion, or within prescribed limits fixed by the charter, has been the common practice of the legislatures of the states of the United States from an early period of their history. The right of the corporators to exercise the powers conferred by the act of incorporation, whether to fix rates themselves or to take those fixed by their charter, and to rest securely on its provisions in this respect, has hitherto been generally regarded as indisputable.

"A grant in general terms of authority

to fix rates is not a renunciation of the right of legislative control so as to secure reasonable rates. Such a grant evinces merely a purpose to confer power to exact compensation which shall be just and reasonable. It is only where there is an unmistakable manifestation of a purpose to place the unrestricted right in the corporation to determine rates of compensation that the power of the legislature afterward to interfere can be denied. It is not to be presumed that the right of legislative control was intended to be renounced. Every presumption is against that. If the grant can be interpreted without ascribing to the legislature an intent to part with any power it will be done. Only what is plainly parted with is gone. Fixing rates in a charter is a specification of what is reasonable, an exclusion of tacit or implied conditions on the subject. It is an essential part of the contract of incorporation, the most important condition of its existence, the inducing cause of its acceptance.

"That it was the legislative intent to vest in the appellee the unrestricted right to fix rates within the limits prescribed by the charter, is clear; that this was a valid contract by the state, obligatory and inviolable by it, we regard as settled authoritatively by Federal and state decisions too numerous for

citation. If anything is or ever can be settled in American constitutional law, the sanctity and inviolability of a contract between a state and individuals in the shape of a charter for a business enterprise, accepted and acted on by the corporators on the faith of its terms and provisions, must be so regarded.

"The appellee has the unquestionable right from time to time, by its Board of Directors, to fix the rates at which it will transport over its railroads, provided those rates shall not exceed the maximum prescribed by the charter. That is the contract. These terms were expressly made. On the faith of them capital was invested and the enterprise set on foot. It is not allowable now for one of the contracting parties to interfere with the exercise by the other of its plainly granted rights. They are secured beyond the reach of legislation and cannot be impaired. The state cannot, by an act of its legislature, abdicate the right to govern artificial as well as natural persons, but it may create corporations, and where they are not a part of the machinery of government, the franchise cannot be resumed by the legislature or its benefits be essentially impaired without the consent of the grantee. To hold otherwise would be revolutionary and disturb the foundations of society as

molded by the judicial utterances of half a century of constitutional government in America.

"While the rates at which the appellee will transport over its roads, not exceeding what is stipulated for in the charter, is for the determination of the appellee and not subject to the control within the chartered limits of the state, it is indisputable that the state may create a commission or board by any name to see that the creature of the state keeps within its charter limits and violates none of its obligations as a common carrier. Whatever the charter rights of the appellee, there are many police regulations the state may lawfully adopt, and it may commit their enforcement to any agency of its selection. It may intrust the oversight and supervision of the operations of railroads to a commission charged with the duty of guarding against abuses the state has the right to correct.

"We do not feel called on to pass upon all of the numerous provisions of the act complained of, and will decide only so much as will properly dispose of this case, leaving other questions to be decided as they arise. The bill is to restrain the commission 'from interfering with the tariff of charges of (complainant), or with the operation, control, or income of said railroad * * * and from

* * * any revision of orator's tariff, or from instituting or aiding in the prosecution of suits for recovery of penalties under said acts, or doing anything under said acts as to orator.'

"In view of what is written, it must be held that the railroad commission cannot interfere with the rates fixed by the Board of Directors of the appellee from time to time for transporting persons and property over its railroad, if those rates are within the limits prescribed by the charter, and that the commission cannot adopt any rule or regulation as to rates violative of the clearly expressed or necessarily implied charter rights of the company; but while this is true, the commission may investigate the control and operation of the company in order to ascertain that it is conforming to its authorization by the charter. It may do many things contemplated by the act creating it, without any violation of the inviolable rights of the company. No reason is perceived why the company may not be required to submit its tariff of charges to the commission in order that it may see that it conforms to the limits fixed by the charter."

The cases of *Wells Fargo & Co. v. O. R. & N. Co.*, 15 Fed. 561, *Ex parte Koehler*, 23 Fed.

529, and *State v. S. P. Co.*, 23 Or. 424, are not in conflict with the doctrine above stated.

In the case of *Ex parte Koehler*, 23 Fed. 529, DEADY, Judge, at page 530, said:

> "So far as the act undertakes to fix the charges for carrying passengers and freight it is claimed to be void, on the ground that it impairs the obligation of the contract of the state with the corporation, to the effect that the latter might prescribe and fix its own tolls and charges, contrary to Section 10 of Article 1, of the national constitution. By Section 2, of Article 9, of the Constitution of Oregon, it is provided that 'corporations may be formed under general laws. * * * All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate right.' The Oregon & California Railway Company was formed under the general corporation act passed pursuant to this constitutional provision on October 14, 1862, which act contains the following section: 'Sec. 36. Every corporation formed under this act for the construction of a railway, as to such road, shall be deemed a common carrier, and shall have power to collect and receive such tolls or freights for

transportation of persons or property thereon as it may prescribe.' (Laws Or. 532.)

"In *Wells Fargo & Co. v O. R. & N. Co.*, 8 Sawy. 614, s. c. 15 Fed. Rep. 561, this court held that this section only authorized the corporation to charge a reasonable compensation for the transportation of persons and property; but that so far it constituted a contract between the state and the corporation, the obligation of which it could not impair by any subsequent legislation. This conclusion, of course implies that the right or franchise of the corporation to demand and have a reasonable compensation for the carriage of persons and property is a "vested" one, within the meaning of the Constitution of the state, and therefore cannot be impaired or destroyed by the legislature under the power to alter, amend, or repeal the general corporation act.

"But it is admitted that the right of the corporation to fix its rates and fares is not absolute, and that, if necessary, the legislature may limit the same to what is reasonable. Nor, in my judgment, is the power of the legislature over the subject absolute. It cannot require the corporation to accept less than a reasonable compensation for its services. And while the presumption may be, and doubtless is, that any rate which the

legislature may prescribe is a reasonable one, such presumption is not conclusive, and may be overcome by evidence to the contrary in any case when the question arises before the courts."

In any event, the cases last cited, hold that a railway corporation, formed under the General Incorporation Act of Oregon of October 14, 1862, has a vested right to collect and receive a reasonable compensation for the transportation of persons and property over its road, which the legislature cannot impair or destroy.

The Railroad Commission, in its order of September 21, 1910, made a finding that the class rates of appellants, then in force in the State of Oregon, were unjust, unreasonable, and excessive, and unjustly discriminatory; and also made the further finding that the rates, which it substituted in lieu thereof, were just and reasonable and non-discriminatory. The bill of complaint alleges on the other hand, that the rates which the appellants were receiving and collecting, afforded no more than a just and reasonable compensation for the transportation of property over their railroad. Therefore, whether or not the rates prescribed and fixed by the Commission impaired or destroyed any vested corporate

right of the appellants, can be determined only by ascertaining whether or not the rates thus fixed by the Commission afforded appellants a reasonable compensation for the transportation of property over their road. *This is a question of fact to be determined by the court, from all the facts and circumstances in the case.*

It is claimed that under these constitutional and statutory provisions the Articles of Incorporation constitute a contract which the state cannot impair by the creation of a railroad commission, giving such commission authority to prescribe or fix rates, and that inasmuch as the Articles of Incorporation of the Oregon & California Railroad Company were executed on March 16, 1870, and those of its predecessors in interest, prior thereto, and while these statutory and constitutional provisions were in effect, that the Railroad Commission Act and the order of the Commission thereunder are and each of them is void.

It is respectfully submitted that under this state of facts the complainants have the power to collect and receive such tolls or freights for transportation of persons or property thereon, as they may prescribe, and that all railroad companies incorporated under the laws of this state

prior to the passage of the Railroad Commission Act, have a vested right to fix those rates, leaving the question of reasonable rates as it exists at common law.

Missouri Pacific R. Co. v. Kansas, 216 U. S., 262, 274.
P. R. L. & P. Co. v. R. R. Co., 105 Pac., 709.
Hammond Packing Co. v. Arkansas, 212 U. S., 322, 345.
C. M. & St. P. R. Co. v. Minnesota, 134 U. S., 418.
Stone v. Farmers' Loan & Trust Co., 116 U. S., 307.
Pa. R. Co. v. Miller, 132 U. S., 705.
Houston & T. C. R. Co. v. Storey, 149 Fed., 499.
L. & N. R. Co. v. Kentucky, 183 U. S., 503.
San Antonio Traction Co. v. Altgeld, 200 U. S., 304.
State ex rel. N. P. Ry. Co. v. R. R. Com., 140 Wis., 145.

While the rule of law announced in the foregoing cases as applying to the particular facts in each case is sound, the question is one of application to the particular language of our state constitution, and the construction of the contract created by the Articles of Incorporation as con-

strued in connection with Section 34 of the Act of October 14, 1862.

In the case last cited, Mr. Justice KERWIN, speaking for the court, says at p. 157:

> "The right to alter or repeal existing charters is not without limitation when the question of vested property rights under the charter is involved. The power is one of regulation and control, and does not authorize interference with property rights vested under the power granted."
>
> *Commonwealth v. Essex Co.*, 13 Gray, 239.
> *Sinking-Fund Cases*, 99 U. S., 700.
> *Shields v. Ohio*, 95 U. S., 319.
> *Miller v. State*, 15 Wall., 478.
> *Holyoke Co. v. Lyman*, 15 Wall., 500.
> *Pearsall v. G. N. R. Co.*, 161 U. S., 646.

It will be noticed that the power to alter, amend, or repeal a law passed pursuant to Section 2, Article XI of the Constitution of the State of Oregon, is entirely different from the reservation upon that subject contained in most state constitutions. The language used in Section 2, Article XI, is:

> "All laws passed pursuant to this section may be altered, amended or repealed but not

so as to alter or destroy any vested property rights."

The question then is whether under the Articles of Incorporation, pursuant to Section 34 of the Act of October 14, 1862, which provides:

> "Every corporation formed under this act for the construction of a railroad, as to such road shall be deemed common carriers, and shall have power to collect and receive such tolls or freight for transportation of persons or property thereon as it may prescribe"

created a vested right which could not be impaired by subsequent legislation. It is, of course, clear that a Railroad Commission Act which authorizes a Railroad Commission to promulgate and enforce reasonable rates or a state statute which fixes a schedule of rates, would necessarily take away from the complainant its power to collect and receive such tolls or freight for transportation of persons or property as it might prescribe. The sole question under this branch of the case is whether the judgment of the carrier in fixing rates for transportation of persons or property shall be supervised, regulated and supplanted by the judgment of the state exercised through a Railroad Commission,

or shall it remain as it was at common law, within the exclusive power and jurisdiction of the carrier to fix these rates, subject only to the power of the courts upon judicial inquiry, to denounce and decline to enforce rates that are excessive and unreasonable. If the carrier, under this constitutional provision and statute, has the exclusive right to prescribe such reasonable rates as in its judgment should be collected subject only to judicial review as at common law, then it follows necessarily that the statute cannot fix these rates by a Commission or otherwise, although subject to judicial review. The Commission Act would, therefore, be unconstitutional in so far as it undertakes to confer authority to fix the rates of a carrier thus incorporated, or to enforce what such Commission might determine to be reasonable rates, and from this it would follow that the order of September 21, 1910, would be necessarily void.

See also *State v. G. N. Ry. Co.*, 100 Minn. 445, 457, and authorities cited.

Stone v. Y. & M. R. Co., 62 Miss. 607.

C. B. & Q. R. Co. v. Jones, 149 Ill. 361, 393.

Pingree v. Michigan Central R. Co., 118 Mich. 314.

Ball v. Rutland R. Co., 93 Fed. 513.

VIII.

The Railroad Commission Act of February 18, 1907, is void because of excessive penalties and unusual burdens imposed for any refusal to observe the orders of the Commission. The Act is oppressive and confiscatory by reason of such excessive penalties and burdens. This question is raised, and the validity of the Railroad Commission Act challenged by appropriate averments found in Paragraph XIII, pages 40-42, Record, also subdivision "*z*", page 46, and other averments showing that the order of September 21, 1910, if enforced, would be confiscatory.

Ex parte Young, 209 U. S. 123.

Whether the said rates prescribed by the Railroad Commission are reasonable or unreasonable, is a judicial question and the legislature cannot prohibit the courts from passing thereon, directly or indirectly, by imposing such penalties as are calculated to terrorize or intimidate a rail-

way company, its officers or agents, so that they are thereby prevented from litigating the question of the reasonableness of the rates, or the validity or invalidity of the same.

Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418.
Ex parte Young, 209 U. S. 123.
Willcox v. Gas Co., 212 U. S. 19.
Consolidated Gas Co. v. Mayer, 146 Fed. 150.
Missouri K. & T. R. Co. v. I. & C., 164 Fed. 645.
Western Union Tel. Co. v. Myatt, 98 Fed. 335.
Central of Georgia Ry. Co. v. R. R. Com. of Alabama, 161 Fed. 925.
St. Louis & S. F. R. Co. v. Hadley, 168 Fed. 317.

The court will take judicial notice of the provisions of the Railroad Commission Act of Oregon, fixing the penalties which shall be imposed upon the railway company violating the provisions of the Act. An inspection of this Act will disclose the fact that the penalties therein provided are excessive, and calculated to deter railway companies from litigating their rights in the courts. For this reason the demurrers should have been overruled.

IX.

The Railroad Commission Act is void because it requires complainants to prosecute any suit to set aside any order made by the Commission, in the Circuit Court of the State of Oregon for the County of Marion, thereby depriving the complainants of their right to litigate their cause in any court of the state, and in the courts of the United States, and is thereby violative of the Fourteenth Amendment to the Constitution of the United States.

Central of Georgia R. Co. v. R. R. Co., 161 Fed. 925.
Herndon v. C. R. I. & P. R. Co., 218 U. S. 135.
Western Union Tel. Co. v. Kansas, 216 U. S. 1.
Pullman Co. v. Kansas, 216 U. S. 56.
Lukwig v. Western Union Tel. Co., 216 U. S. 146.
Southern Ry. Co. v. Greene, 216 U. S. 400.

The cases just cited, it is true, hold that state statutes subjecting a foreign corporation authorized to do business within a state to restrictions which would prevent such corporation from liti-

gating its rights in the Federal Courts or removing suits or actions brought against it to the Federal Court, are void, and yet the principles underlying these cases apply to the Railroad Commission Act, if the limitation requiring the carrier to litigate the reasonableness of rates prescribed by the Commission in the State Circuit Court for Marion County, shall be held jurisdictional and a prerequisite to judicial review. In other words, if the only judicial review must be had in a state court and the act would not have been passed but for this provision, the entire act should be held void.

There is a conflict of opinion as to whether or not jurisdiction can be conferred upon a court to determine as a fact whether or not rates prescribed by a Railroad Commission are unreasonable, but the weight of authority, in our opinion, is that such jurisdiction can be so conferred. However, the Railroad Commission Act provides by its express terms for a judicial review of any order of the Commission affecting rates, fares, charges, classification, joint rate or rates, regulations, practice, or service.

Ex parte Young, 209 U. S. 123, 144.
Chicago etc. R. Co. v. Minnesota, 134 U. S. 418.

Reagan v. Farmers' etc. Co., 154 U. S. 369, 399.
St. Louis etc. R. Co. v. Gill, 156 U. S. 649.
Covington, etc. Co. v. Sandford, 164 U. S. 578.
Smyth v. Ames, 169 U. S. 466, 522.
Chicago, etc. Co. v. Tompkins, 176 U. S. 167, 172.

If jurisdiction cannot be conferred upon a court to determine whether or not rates so prescribed are unreasonable, then the Act must be held void, because it is apparent that the Act would not have been passed but for the provision relating to judicial review. Whether the provision for judicial review constitutes an essential part of the rate-making power conferred by the Act, is open to question. If the provision for judicial review is a part of the rate-making power, then the Act is void because rate-making is not the function of a judicial tribunal.

Prentis v. Atlantic Coast Line Ry. Co., 211 U. S. 210.

Assuming that the Act is valid, and confers authority upon the courts to review and set aside the rate or body of rates promulgated by the Commission, when found by the court to be un-

reasonable in fact, it is respectfully submitted that the Federal Court, recognizing the right created by this state statute, for judicial review of an unreasonable rate, will assume jurisdiction and enforce this right created by the statute, and will determine whether or not such rates are unreasonable in and of themselves, and independently of the question whether or not the reduction effected by such rates would deprive the railroad company of a just and fair return upon its property. The rate may be unreasonable in fact in and of itself, or an order prescribing ates may be subject to judicial review because the rates prescribed are as a matter of fact unreasonable, even though the reduction thereby effected cannot be said to be confiscatory in whole or in part.

Delaware L. & W. R. Co. v. Stevens, 172 Fed. 595.

Chicago I. & L. R. Co. v. Hunt, 79 N. E. 927.

Lord's Oregon Laws, Sections 6910, 6911, 6912, 6913, 6914.

1 Pomeroy's Equity Jurisprudence, Sec. 293, note pages 499, 500, 501, 502, 503, 504, 3rd ed.

Richardson v. Green, 61 Fed. 423.

Fitch v. Creighton, 24 Howard 159, 163.

Brine v. Insurance Co., 96 U. S. 627.

Ex parte Yarbrough, 110 U. S. 651, 666.

Holland v. Challen, 110 U. S. 15.

Williams v. Crabb, 117 Fed. 193.

Wart v. Wart, 117 Fed. 766.

Atchison, T. & S. F. R. Co. v. Love, 174 Fed. 59.

Sawyer v. White, 122 Fed. 223, 227, citing many cases.

Railroad Commission v. Houston & Texas R. Co., 90 Tex. 340.

M. L. & T. R. & S. S. Co. v. Railroad Commission, 109 La. 247.

N. P. Ry. Co. v. R. R. Commission, 106 Pac. 611.

C. B. & Q. R. Co. v. Jones, 149 Ill. 361.

Janvrin, Petitioner, 174 Mass. 514, 517.

R. R. Co. v. R. R. Commission, 136 Wis. 146.

The State v. Railway Co., 76 Kan. 467.

Michigan Central R. Co. v. Michigan R. R. Com. 160 Mich., 355.

Michigan Central R. Co. v. Circuit Judge, 156 Mich. 459.

Texas & P. R. Co. v. R. R. Commission, 127 La. 387; s. c. 53 So. Rep. 660.

State v. Railroad Commission, 110 Pac. 1075.

To determine whether the bill of complaint is sufficient as against a demurrer, the general rule is that if the allegations state ultimate facts, the complaint will be deemed sufficient without requiring a detailed statement of particular facts from which the ultimate facts are to be found.

State ex rel. v. Railroad Commission, 48 Fla. 129, 145.

Allen v. O'Donald, 23 Fed. 573, 576 (DEADY, J.).

St Louis v. Knapp Co., 104 U. S. 658, 660.

Wallace v. Arkansas Central R. Co., 118 Fed. 422.

Houston & T. C. R. Co. v. Storey, 149 Fed. 499, 501.

South & N. A. R. Co. v. R. R. Commission of Alabama, 171 Fed. 225, 227.

A complaint of a railway company which alleges positively and unequivocally that the freight transportation rates prescribed and fixed

by a Railroad Commission, are unreasonable and that they do not give to the railway company a fair and reasonable compensation for the services required to be performed by it, is sufficient to tender an issue as to the reasonableness of such rates, without setting up all the facts bearing upon the question. General certainty is sufficient in pleadings in equity.

Story's Equity Pleadings, Section, 252, 253.
St. Louis v. Knapp, 104 U. S., 658.
Allen v. O'Donald, 23 Fed., 573.
Houston & T. C. R. Co. v. Storey, 149 Fed., 499.
State ex rel. Railroad Commission v. S. A. L. Ry. Co., 48 Fla., 128.
O'Hare v. Downing, 130 Mass., 16.

The bill of complaint alleges facts showing that the rates fixed by the Railroad Commission are unreasonable and that they do not give to the companies a fair and reasonable compensation for the services required to be performed by appellants, and this is, therefore, sufficient under the authorities.

It is, of course, well settled that the courts, both Federal and State, will review the order of a Railroad Commission where it appears to be

confiscatory, and this without regard to the penalties or burdens imposed by the statute and this upon constitutional grounds, but there is a conflict of judicial opinion as to whether or not the courts will review the action of a Railroad Commission having authority to fix a reasonable rate when the question is whether or not the rate is or is not unreasonable and where it is not claimed that the rate promulgated is in and of itself necessarily confiscatory.

If it shall be held that under the Railroad Commission Act of February 18, 1907, as amended February 23, 1909, that the courts cannot review the order of a Railroad Commission made within its jurisdiction, which is claimed to be unreasonable or oppressive, or that the courts cannot review the reasonableness of a rate or body of rates which may or may not be confiscatory, and if the only question that can be determined by the courts in that behalf is whether or not the Commission had jurisdiction to make an order promulgating the rate or the order promulgating or regulating the service, then the Railroad Commission Act should be and is void, because it would be in effect class legislation, and while applicable to all transportation companies affected thereby, it would not give to the particular trans-

portation company or carrier a constitutional right to determine an issue of fact, judicial in character, committed irrevocably under that view of the statute to an administrative body called a "Railroad Commission," or to a body exercising an administrative function. Such a construction of the act would result in the necessary conclusion that it was unconstitutional and void. There is no reason in principle why a finding of fact which forecloses and determines the property rights of a railroad company should be fixed irrevocably by an administrative board and placed beyond judicial review, when every other issue or finding of fact affecting the pecuniary interests of other persons in their vocations or callings or business may question by judicial procedure the validity of the finding so affecting pecuniary rights. The fact that the property owned by a railroad company is devoted to public service and public use does not destroy its private ownership or take from that property, as private property, any essential pecuniary right, and any construction of a Commission Act which makes the finding or order of the Commission upon a question of fact conclusive upon the carrier and the public and conclusive upon the courts, is a denial of the

equal portection of the laws and a deprivation of property without due process of law.

We are not unmindful of the opinion of the Supreme Court of the United States in the case of *Interstate Commerce Commission v. Ill. Cen. R. Co.*, 215 U. S. 452, which it is claimed is to the effect that the orders of the Interstate Commerce Commission prescribing reasonable rates are not subject to judicial review, if such orders were within the jurisdiction of the Commission.

In the case last cited, Chief Justice WHITE, speaking for the court, says at p, 442:

> "In the argument at bar, the railroad companies do not question that if a complaint is made to the Interstate Commerce Commission concerning the unreasonableness of a rate, that body has the authority to examine the subject, and, if it finds the rate complained of is, in and of itself, unreasonable, having regard to the service rendered, to order the desisting from charging such rate, and to fix a new and reasonable rate, to be operative for a period of two years. The companies further do not deny that where the Commission exercises such authority, its finding is not subject to be reviewed by the courts, *Interstate Commerce*

Commission v. Illinois C. R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. Rep. 155. In other words, the argument on behalf of the railroads fully concedes that an order of the Commission is not open to attack in the courts so long as that body has kept within the powers conferred by the statute."

Referring to the case of *Interstate Commerce Commission v. Illinois Central Railroad Co.*, 215 U. S. 452, the Interstate Commerce Commission in its 24th annual report, page 17, says:

"The railroad company contended that the Commission had no jurisdiction over this rule or practice, and, further, that in case it had, the court might re-examine the conclusion of the Commission, and should set aside that conclusion as erroneous in this case. The Supreme Court held that the Commission had jurisdiction and that its conclusion was not reviewable by the courts. This case apparently lays down the broad principle that the courts have no jurisdiction to review the discretion of the Commission if it acts within the limits prescribed by the statute and if its order does no violence to the Federal Constitution that order cannot be disturbed by the courts."

It must be borne in mind, however, that these decisions are predicated upon an act of Congress which gave to the Interstate Commerce Commission authority in specific terms to set aside unjust or unreasonable rates and to promulgate in lieu thereof just and reasonable rates, *leaving in the Commission authority to set aside, suspend or modify the order made in that respect or to set aside or suspend the same*, while here, the order under consideration may be suspended and set aside by a court of competent jurisdiction under express authority so conferred upon the courts to determine whether or not the rate prescribed is in and of itself unreasonable, independently of the question whether or not it is confiscatory, and it will be noticed that if, under that act, a Circuit Court of the United States could not set aside a rate which was in and of itself unreasonable when promulgated by the Interstate Commerce Commission, then under the act to create the Commerce Court, such authority for judicial review is withheld, for it is expressly provided by this act that "nothing contained in this act shall be construed as enlarging the jurisdiction now possessed by the Circuit Courts of the United States, or the judges thereof, that is hereby

transferred to and vested in the Commerce Court," although jurisdiction is given to the Commerce Court of cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission. If logically there was no authority for judicial review of the reasonableness of an order made by the Interstate Commerce Commission or of an individual rate promulgated by the Interstate Commerce Commission, then it would seem to follow that the only thing that can be determined by the Commerce Court is whether or not the order or rate made was within the jurisdiction of the Interstate Commerce Commission, and under all the authorities whether or not the order or the rate or body of rates was so far confiscatory of the property of the carrier as to constitute a taking of the property without just compensation. But assuming that the cases cited hold that the courts cannot review the decision of the Interstate Commerce Commission as to whether or not an order or a rate in and of itself is unreasonable, and can only determine whether the order or rate is within the jurisdiction of the Interstate Commerce Commission, it does not follow that where,

as here, a state statute authorizes a railroad commission to promulgate a rate effective unless suit is brought to set it aside, and where the statute expressly provides for judicial review of the rate thus authorized to be made, the courts may not annul or set aside an unreasonable rate or order. In such cases the Federal Courts will enforce that right and will not send the complaining carrier to the state court, although the statute provides or designates the state court as the court of judicial review. Under the state statute the rate becomes effective unless suit is brought to annul the rate and set it aside or the same is adjudged in that suit unreasonable. Upon well settled principles the right thus conferred impinges upon and qualifies the power of the Commission to make an *effective and final rate*. Such rate, when made, is expressly made subject to suspension or annulment by judicial review, and under the authorities that right is a substantive one, relating to the *power of the Commission*, and is *not a mere remedy to carry into effect the orders of the Commission*. It is not a rate-making power, but it is a judicial power. That power when exercised does not make a new rate but determines the fact

whether the rate promulgated by the Commission is or is not unreasonable or whether or not the order of the Commission as to some other subject within its jurisdiction is or is not unreasonable.

Counsel for defendants contend that fixing a rate is a legislative function, and that the courts, in the exercise of judicial power, cannot promulgate or fix a rate. We have cited numerous authorities to the effect that the power to make a rate is legislative, when declared by law, and that the Commission executes the law, as an administrative body. Promulgation of a rate to be observed is a rule of conduct for the future, and partakes of the nature of legislation, although strictly speaking it is merely administrative, carrying out a rule of law fixed by the legislature. It is fundamental that legislative power cannot be delegated to a commission, but the legislature may create a rule of action, or may by statute declare that all railroad rates shall be just and reasonable, and create a commission to ascertain the facts and apply this legislative rule. *In the exercise of these functions by a commission, the inquiry is one of fact and not one of law, and the determination of this body*

upon any question of fact is not conclusive upon the judiciary, but it is clothed with a presumption that the finding is *prima facie* reasonable. Any statute that would make the findings of any administrative body of this character conclusive upon a question of fact would be unconstitutional and void. Therefore it is contrary to fundamental principles to assume that the determination of the question of fact whether or not a specific rate or body of rates is or is not reasonable, is the exercise of legislative or administrative functions by the courts. It proceeds upon the theory of judicial inquiry, and many of the authorities cited by counsel in support of their contention that the findings of fact of a railroad commission are conclusive as to the reasonableness of a rate or order, and cannot be reviewed by the courts, are cases in which the courts decline to disturb the findings of the commission or tribunal, upon the ground that these findings were clothed with a *prima facie* presumption of reasonableness. *The question was not one of power, but one of judicial conclusion, and in no case has it been directly ruled that the courts will decline to review the reasonableness of a rate in and of itself, or the reasonableness of an order in and of itself, where there was a*

controversy as to the questions of fact underlying the order or action of the Commission.

The nearest approach to a determination of this question is found in the case of *Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U. S. 452, followed by that court in *Southern Pacific Company v. Interstate Commerce Commission*, 219 U. S. 433. But it is respectfully submitted that in neither of these cases, even under the Interstate Commerce Act, was it directly determined that there could be no judicial inquiry as to the reasonableness of an order or rate, *depending upon disputed questions of fact.* But, however that may be, no such contention can be made in the case at bar, for the reason, if for no other, that by the express provisions of the statute from which the Railroad Commission derives its power, a right is created which expressly authorizes judicial review not only of the reasonableness of the rate in and of itself, but of any order which the Commission may make. Like provisions in other jurisdictions have been sustained and enforced, not only by the state courts under their general powers, and independently of any limitation as to the particular court in which such judicial review is to be had, but in the Federal courts as well.

In *Missouri K. & T. R. Co. v. Love*, 177 Fed. 493, 502, HOOK, C. J., says:

> "The demurrers: It is argued that the freight and passenger rates are still in legislative process, and therefore within the doctrine of *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 20 Sup. Ct. 67, 53 L. Ed. 150, not properly the subject of judicial consideration. Both phases of this contention have already been considered in connection with the pleas. 174 Fed. 59. It is the law of the land that a state may not confine to its own courts a citizen who claims his rights under the Constitution of the United States have been denied. And the Supreme Court did not hold in the *Prentis Case* that a similar result could be accomplished by prescribing and enforcing under penalties a legislative rule, even though tentative, and restricting the remedy of the citizen to subsequent legislative inquiry and action."

It will be borne in mind that *Prentis v. Atlantic Coast Line*, 211 U. S. 210, had under consideration the action of the State Corporation Commission of Virginia under a provision of law which provides that the jurisdiction of the Supreme Court of Appeals, on appeal, should

revise and correct these rates, and it was there held that proceedings for fixing rates and charges, whether in the Commission or in the Court of Appeals, on appeal, were *legislative* in character, although the principal aspect of these tribunals might be judicial. In other words, it was said that the legislative or administrative proviso fixing the rates complained of was not so complete as to give an absolute, unqualified right to resort to the courts. As stated by HOOK, Circuit Judge in *Atchison T. & S. F. R. Co. v. Love*, 174 Fed. 59, 63:

> "Complainants did not invoke the jurisdiction of the Commission, as authorized by the above proviso, but brought these suits after some experience with the rate prescribed. It cannot be assumed the Commission would have failed to give them relief if they were entitled to it; but the questions now before the court are whether they should have first gone there before bringing these suits, or were absolutely required to seek their remedy in the Commission and the Supreme Court of the state as tribunals of exclusive jurisdiction. The doctrine of the *Virginia cases* does not apply because the prescription of the passenger rate had passed the legislative stage, and

had become a completed rule of action. As regards the question here, the constitutional provision is not different from an act of the Legislature definitely fixing rates and committing to some particular state tribunal jurisdiction to determine their reasonableness, and if found unreasonable then legislative power to substitute other rates in their stead. The situation presented is that of a case calling for judicial inquiry and determination, and the second question is whether they may be had in this court, or must be had in the state tribunals. Upon that, the following principles, believed to be firmly imbedded in the jurisprudence of this country, are decisive: When the jurisdiction of a court of the United States is invoked upon sufficient grounds, it cannot be relieved of its duty to take cognizance and proceed, either by constitutional provision or by legislative act of a state. If, according to recognized principles of jurisprudence, the case is in its essential features a civil action at law or in equity, it matters not that the state may have denied the complaining party access to its courts, or may have designated some particular local tribunal, to the exclusion of all others, state and national. The test is the existence of a controversy and its character, and the presence of grounds

of federal jurisdiction, not whether the courts of the state are open, or to what extent. The exercise of jurisdiction so invoked is the right of the litigant under the supreme law of the land. It is a duty of the court, which may not be avoided. *Lawrence v. Nelson*, 143 U. S. 215, 12 Sup. Ct. 440, 36 L. Ed. 130; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 40, 20 Sup. Ct. 192, 53 L. Ed. 382; *Spencer v. Watkins* (C. C. A.) 169 Fed. 379."

Under the Oregon Railroad Commission Act, Sections 31, 32, 33, 34, 35 and 36, (Lord's Oregon Laws, Sections 6909, 6910, 6911, 6912, 6613, 6914) it does not appear that the authority and jurisdiction conferred upon the Circuit Court of Marion County is a part of the rate-making procedure prescribed by the Act, and if it had so provided, under the constitution of this state, which prohibits the exercise by the judiciary of any of the functions or duties of the legislative or the executive department, or the administrative department, such provisions so construed would be void. It therefore follows that the Commission may prescribe rates, fares, charges, classification, and joint rates, and that they are *prima facie* lawful and shall be in force, and *prima facie* reasonable, until found otherwise under and

pursuant to the provisions of Sections 31, 32, 33, 34, 35 and 36 of the Act, (Sections 6909, 6910, 6911, 6912, 6913, 6914 Lord's Oregon Laws). The court, in determining whether or not this presumption of reasonableness and of lawfulness shall stand or be overcome, enters upon the inquiry with the presumption that the rates are lawful and reasonable, and the burden of proof rests upon the contesting carrier. Under well settled rules, the action of the court in that behalf is judicial. The court does not assume to prescribe or promulgate a rate in lieu of the rate under attack, even though the court should find that such rate is unreasonable. It is true that if, upon the trial of such suit, evidence shall be introduced by the plaintiff which is found by the court to be different from that offered upon the hearing before the Commission, or additional thereto, the court, before proceeding to render judgment—unless the parties to such suit stipulate in writing to the contrary—shall transmit a copy of such evidence to the Commission, and should stay further proceedings for fifteen days from such date, and that upon the receipt of such evidence, the Commission should consider the same, and might alter, modify, amend, or rescind its order, and if the Commission should rescind

its order, the suit should be dismissed; or if it should alter, modify, or amend the same, such altered, modified, or amended order should take the place of the original order, and judgment or decree should be rendered as though made by the Commission. If the original order should not be rescinded or changed, judgment should be rendered upon such original order.

This is a sort of hybrid provision which, in view of the constitutional inhibition against clothing a judiciary department with any of the functions of the legislative, executive, or administrative departments, must be held to be void. Especially is it inapplicable to the Federal Court. It is a mere procedure intended to allow the Commission to resume jurisdiction over the rate after the carrier has brought its suit to test the reasonableness of the rate under the order made.

It is respectfully submitted that when a Railroad Commission has made its order prescribing a rate which it deems to be reasonable, that it then *has exhausted its function as a rate-making body* as to that rate, and that any law which seeks to confer upon the commission jurisdiction to withdraw the provision for judicial review from operation, and to deprive the judiciary of the right to consider the matter, is an anomaly,

and one that cannot be held to be valid. The right to recall the order, and to oust the court of jurisdiction for the time being is made to depend upon the question whether the carrier, as a litigant in that suit, has introduced some other evidence than was before the Commission. Will counsel say what function the court is performing when it assumes jurisdiction? Is it acting in a legislative capacity, in an administrative capacity, and as a part of the rate-making power, and if so, when does it cease to so act, and when does it begin to act as a judicial tribunal?

It is freely admitted that a court cannot prescribe or promulgate a rate, for that is not a judicial function. It is equally true, however, that a court can and will set aside an unreasonable rate, which would of course have the effect to leave the jurisdiction of the Commission intact to proceed to promulgate a reasonable rate for the guidance of the carrier in the future.

By Section 12 of the Railroad Commission Act (Lord's Oregon Laws, Section 6887), the legislature has declared that "charges made for any service rendered or to be rendered in the transportation of passengers or property * * * shall be reasonable and just, and every unjust

and unreasonable charge for such service is prohibited and declared to be unlawful." This is the rule of action prescribed by the legislature. The Commission has no legislative authority, but is charged with purely administrative functions, quasi judicial, perhaps, to ascertain upon its own initiative, or otherwise, from evidence offered and admitted, whether particular rates in effect are reasonable or unreasonable, and the conclusions of the Commission in that respect are findings of facts, and the findings of fact are clothed with the presumption that the order based thereon is *prima facie* reasonable.

Thus far the Commission does not act as a court, or perform a judicial function. Thereupon the statute, by the sections mentioned, attempts to create in favor of the carrier the right to judicial review, and it is respectfully submitted that that right of judicial review cannot be suspended in the heavens, like Mahomet's Coffin, and be called from the court to the Commission, or sent back by the Commission to the court, at the pleasure and option of the Commission, if, forsooth, the carrier should offer in the trial of the cause involving a judicial review, some little evidence that was not before the Commission when it was exercising its rate-making or *rate ascertaining function*.

We are, however, not without authority in support of the contention that where a statute, as here, has created a substantive right, that this right can be enforced in a judicial tribunal.

See

Northern Pac. Ry. Co. v. R. R. Commission of Washington, 106 Pac. 611.

Morgan's L. & T. R. Co. v. Railroad Commission, 109 La. 247.

Chicago, I. & L. Ry. Co. v. Hunt, 79 N. E. 927.

R. R. Commission of Texas v. H. & T. C. R. R. Co., 90 Tex. 340.

In *Railroad Commission v. Houston & Texas Central Railway Co.*, 90 Texas, 349, the court concluded by holding that the Railroad Commission Act of Texas provided for judicial review, and made the question of whether or not a rate prescribed by the Commission was unreasonable and unjust a question for the determination of the courts, as a judicial question.

See also

State v. Railway Company, 76 Kan. 467.

M. St. P. & S. S. M. R. Co. v. R. R. Commission, 136 Wis. 146, 158.

Mr. Justice TIMLIN, in the case last cited, says at p. 158:

"Whether it is within the power of the legislature to confer upon courts authority to review the reasonableness of rules or orders of the Railroad Commission depends upon the fundamental nature of these rules or orders. If such rules and orders are *purely legislative* and violate no constitutional law or paramount federal statute, it would be incorrect to say that their reasonableness could be the subject of judicial review, because that would give the judicial branch of government a supervisory control over legislation, largely discretionary, and limited only by the judicial opinion of what is reasonable. * * *

"If this court, or the circuit court were by the statute in question authorized to investigate the subject *anew*, to put itself in the place of the Commission and search for this reasonable and just rate, *with power to substitute its own judgment of what is reasonable and just* for the judgment of the commissioners, the statute might be subject to grave criticism. But the courts are not by this statute so authorized. The authority given to the circuit court is not to search for or disclose or declare this "reasonable and just" rate

or service, *but merely to determine whether the order of the Commission is "unreasonable"*—quite a different thing. We think the legislature was within its power in conferring upon the courts such authority to inquire whether or not *the order of the Commission was unreasonable* and to vacate the order if so found. *In doing so the courts are required to exercise no legislative power, to ascertain and disclose no rates*, to declare no rule or no law unreasonable, *but merely to exercise judicial power to ascertain and determine whether the Commission has so far failed in its search for this lawful, just, and reasonable rate as to have found instead, and declared, that which is unreasonable*" (p. 164).

This language is peculiarly appropriate because the provisions for judicial review, and the general provisions of the Railroad Commission Act of Wisconsin have been substantially copied by the legislature of the State of Oregon in its adoption of the Railroad Commission Act of February 18, 1907.

See also

Janvrin, Petitioner, 174 Mass. 514.

Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361.

In the case last cited, the court, speaking by Mr. Justice MAGRUDER, says at p. 382:

> "Third, it is argued that the provision of the statute making the schedule of the commissioners *prima facie* evidence, that the rates therein fixed are reasonable maximum rates of charges, is unconstitutional and void, not only as depriving the carriers of their property without due process of law, but as infringing upon the right of trial by jury. We do not think that this objection should be sustained. In the first place, the act does not deprive the railroad corporations of the right to *have a judicial determination of the reasonableness of the rates, if they are not satisfied with the schedule made by the Commission. The courts are open to them for a review of the acts of the Commissioners in fixing the rates of charges.* In the next place, the provision is an exercise by the legislature of its undoubted power to prescribe the rules of evidence."

It is thus seen that under the Commission Act of the State of Illinois, where judicial review is provided, and where the findings of the Commission are clothed with the presumption that they are *prima facie* reasonable, the court sustained the provision for a judicial review, upon the ground that but for such judicial

review it might be contended that the rates prescribed would be void, and that the act fixing the rates would be unconstitutional in that it would deprive the carriers of their property without due process of law.

There is abundant authority for the proposition that where a substantive right or remedy is created by state legislation, that the Federal Courts will, as far as possible, in suits in which they have original jurisdiction, enforce this substantive right according to the practice of a court of equity. See *Williams v. Crabb*, 117 Fed. 193, and other cases hereinbefore cited.

Under the Railroad Commission Act of Florida, provision is made for judicial review of the rates promulgated by the Commission, and these provisions have been sustained.

State ex rel. R. R. Com. v. Seaboard, etc. Ry. Co., 48 Fla. 129, 144.

State v. Railroad Commission, 110 Pac. 1075.

Texas, etc. Ry. Co. v. R. R. Com. of Louisiana, 53 So. 660; same case 127 La. 387.

Houston & Tex. Cent. R. Co. v. Storey et al., 149 Fed. 499.

Delaware, L. & W. R. Co. v. Stevens, 172 Fed. 595.

The opinion of the court in the case last cited was announced by RAY, District Judge, and in that case the court says, at page 608:

> "It is urged, also, that the complainant company should not be permitted to come into the United States Circuit Court as it could sue or pursue a remedy in the courts of the state. If the legislative act was complete with the denial of the application to modify the order, *and the day had come when the order of the commission was to go into effect, as it had*, the complainant here had the right to go into the courts, and it had the right to select as its tribunal, any tribunal having jurisdiction of the parties and subject-matter. The complainant is a non-resident of the state of New York, and hence there is the necessary diversity of citizenship to give this court jurisdiction and a federal question is also involved. In such case, as matter of equity and of law, the complainant may go directly to the federal courts, and is under no obligation to first test the questions in the state courts."

In *Michigan Central R. Co. v. Circuit Judge*, 156 Mich., 459, 470, the court says:

> "We do not construe the provisions of this act to lodge in the courts the power to *establish* rates. The power conferred upon the courts is solely to determine whether the

rates *are confiscatory* or *unreasonable.* If the courts should so find, *they are not authorized to determine what are reasonable*, but the matter must again be referred to the Commission to establish other rates. If they are found to be reasonable, the courts will sustain the action of the Commission. If, however, it should be determined that such power was conferred upon the courts and is unconstitutional, the act would still be held valid, because it could stand with that clause eliminated from the statute. Courts declare legislative enactments invalid only when they are able to determine from the act itself that the legislature would not in all probability have enacted the law with the objectionable features eliminated."

See also

Michigan Central R. Co. v. Railroad Commission, 160 Mich. 355.

The case last cited discusses at length the distinction between the exercise of the power conferred upon or delegated to a Railroad Commission, and that created by a substantive right providing for judicial review of the action of such Commission.

See also

McGrew v. Missouri Pac. Ry. Co., 230 Mo. 496.

Copper & Iron Mfg. Co. v. Manufacturer's Railroad Co., 230 Mo. 59.

Steenerson v. Great Northern Ry. Co., 69 Minn. 353.

Portland Ry. L. & P. Co. v. R. R. Com. of Oregon, 109 Pac. 273; same case 105 Pac. 709.

State ex rel N. P. Ry. Co. v. R. R. Commission, 140 Wis. 145.

Central of Georgia R. Co. v. R. R. Com. of Georgia, 161 Fed. 925.

In re Arkansas Railroad Rates, 163 Fed. 141.

That a particular rate charged to be unreasonable will be reviewed is also sustained by judicial authority.

I. C. C. v. Chicago Great Western R. Co., 141 Fed. 1003.

People v. Willcox, 194 N. Y. 383.

Village of Saratoga Springs v. Gas Co., 191 N. Y., 123.

Louisville & N. R. Co. v. Brown, 123 Fed. 946.

King Lumber Co. v. A. & L. R. Co., 58 Fla. 292.

State v. Railroad Company, 58 Fla. 524.

Southern Ry. v. Atlantic Stove Works, 128 Ga. 207.

The case last cited involved the reasonableness of a schedule of rates for certain commodities.

Southern Ind. R. Co. v. Railroad Co., 172 Ind. 113.

Under the Virginia constitution there was no inhibition which precluded the exercise by the Supreme Court of Appeals of administrative or rate-making functions, and the Railroad Commission Act of Virginia was held to be valid as not in violation of the constitutional provision permitting the exercise of such functions by a court.

Atlantic Coast Line R. Co. v. Commonwealth, 102 Va. 599.

That the Federal Courts will enforce a substantive right created by a state statute is well settled, but for convenient reference the attention of the court is called to

I. Pomeroy's Equity Jurisprudence, Sec. 293 and notes. (Third Edition.)

Sawyer v. White, 122 Fed. 223, 227, and cases cited by the Circuit Court of Appeals, Eighth Circuit.

If the function of the Commission is found to be merely administrative, or quasi judicial, cloth-

ing the Commission with authority to ascertain facts based upon which findings the Commission may declare the application of the legislative rule requiring that service be reasonable and that rates be reasonable, then there is perhaps no objection to the Oregon Act upon the ground stated. If, however, it shall be held that the order made by the Commission is conclusive upon the courts, and that its decision is final both as to whether or not a rate is or is not reasonable, or as to whether or not an order is or is not reasonable, and that the provision for judicial review is merely in furtherance of its rate-making power, and that under this there can be no review of the questions of fact, and then only in the state court, with a right to resume jurisdiction in the Commission —the moment any evidence is introduced by the complainants in the state court, then it necessarily follows that the Commission Act is void not only because it fails to provide for judicial review, but it deprives the carrier of that constitutional right, if so construed, or limits its right to litigate the question in the state court, contrary to constitutional guaranties.

To determine whether the bill of complaint is sufficient as against a demurrer, the general rule is that if the allegations state ultimate facts the

complaint will be deemed sufficient without requiring a detailed statement of particular facts from which the ultimate facts are to be found, nor do we think the court should sustain the special demurrers even though the court should be of the opinion that the Railroad Commission Act under consideration is valid and is not unconstitutional. It is always proper, having in mind the general aspect of a bill of complaint in equity, to state in apt and appropriate terms matters which when considered by themselves may be considered to be more or less conclusions of law, but which when read in connection with substantive averments of fact applicable to the entire frame work of the bill such averments are relevant and pertinent, and the demurrer to the same ought not to be and will not be sustained.

In *Allen v. O'Donald*, 23 Federal 573, DEADY, Judge, says at p. 576 :

> " The further point made in support of the third exception, that the matter excepted to is a mere conclusion of law, is not well taken. It is sometimes proper and convenient in equity pleading, as a means of indicating the relief to which the party considers himself entitled, or the defense sought to be

made, to make deductions from the facts stated that are more or less conclusions of law; and this seems to be the character of this allegation."

In *St. Louis v. Knapp Company*, 104 U. S. 658–660, Mr. Justice HARLAN, speaking for the court, says at p. 660:

"We are of opinion that the demurrer should have been overruled, and the defendant required to answer. The bill makes a *prima facie* case, not only of the right of the city to bring the suit, but for granting the relief asked. * * * This is not, as ruled by the Circuit Court, merely the expression of an opinion or apprehension upon the part of the city, but a sufficiently certain, though general, statement of the essential ultimate facts upon which the complainant rests its claim for relief. It was not necessary, in such a case, to aver all the minute circumstances which may be proven in support of the general statement or charge in the bill. While the allegations might have been more extended, without departing from correct rules of pleading, they distinctly apprise the defense of the precise case it is required to meet. There are some cases in which the same decisive and categorical

certainty is required in a bill in equity as in a declaration at common law. *Cooper, Eq. Pl. 5.* But, in most cases, general certainty is sufficient in pleadings in equity. Story, Eq., Pl., sects. 252, 253."

See also *South & N. A. R. Co. v. Railroad Commission*, 171 Fed. 225.

It is a well settled rule in negligence cases that a complaint which states the ultimate facts states a good cause of action.

See *Cederson v. Oregon Navigation Co.*, 38 Ore. 343.

See also *State ex rel. Railroad Commissioners et al. v. Sea Board Air Line Railway*, 48 Fla. 129–146.

In *Wallace v. Ark. Central R. Co.*, 118 Fed. 422, Circuit Court of Appeals, Eighth Circuit, speaking by THAYER, Circuit Court Judge, says at p. 424:

"It is obvious, we think, that no relief can be afforded to the appellants in this court, whether the action of the lower court upon the demurrer to the fifth and tenth paragraphs of the bill was erroneous or otherwise. Both the original and substituted bills contained a specific allegation that the tariff schedule which had been put in force by the Commission, and made effective as of August 2, 1900, would reduce

the complainant's earnings to such an extent as would amount to a taking of its property for public use without just compensation. It was averred in that paragraph of the bill that such would be the effect of the proposed schedule, because the income which the complainant was at the time deriving from all sources, by the use of its property, was not sufficient, under the existing schedule of rates, to enable the company to pay its operating expenses, taxes, and fixed charges, and that the proposed schedule of rates would yield far less than the existing schedule. In view of the action taken by the defendants when their demurrer to the fifth and tenth paragraphs of the bill was overruled, these allegations stood confessed; and, such being the case, the decree of the lower court was clearly right under repeated decisions of the supreme court of the United States holding that a state law or regulation establishing rates for the transportation of persons or property, such as will not admit of the carrier earning such a compensation as under all the circumstances of the case is just to it and the public, operates to deprive the company of its property without due process of law, and to deny to it the equal protection of the law, in violation of the fourteenth

amendment to the federal constitution. *Smyth v. Ames*, 169 U. S. 466, 522, 523, 18 Sup. Ct. 418, 42 L. Ed. 819; *Reagan v. Trust Co.* 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014."

To the same effect is *Houston & T. C. R. Co. v. Storey*, 149 Fed. 499-501.

In *South & N. A. R. Co. v. Railroad Commission of Alabama*, 171 Fed. 225, the Circuit Court speaking by JONES, District Judge, says:

"So many difficult and intricate questions of law and fact are involved in suits attacking freight and passenger rates upon constitutional grounds that it has become the custom of the pleader in this class of bills not only to state enough of the facts to show that the allegations as to the rates being unreasonable or confiscatory are not mere conclusions of the pleader as distinguished from allegations of fact, but to go quite beyond that, and to allege many facts and circumstances which, strictly speaking, are merely evidential or argumentative, in support of the contentions of the complainant, and to meet what may be offered in opposition to them, such as the facts going to show the value of the property devoted to the public use, the justice of the carrier's methods of transacting business, the

fairness of their accounts of expenditures and disbursements, the reasonableness of the rates charged, the gross and net earnings, the volume of domestic and interstate earnings, how they are derived and apportioned respectively, and the like. Frequently the pleader dwells upon particular results and phases of the practical operation of the rate statutes upon the carrier's business, as conducted under existing conditions. Sometimes the pleader sets forth, as illustrative of his claim as to the true interpretation and construction of the statutes, the "purpose" of the legislation, meaning the intent as gathered from the language of the statutes, and the conditions with which they deal. Strictly speaking, all this is objectionable, under the ordinary rule of good pleading, as, in legal effect, it is only setting out *in extenso* in the bills mere argument or evidence to prove the proper construction of the statutes. Yet such allegations foreshadow the principal contentions of law and fact and the numerous issues which arise on the proof, which must enter into the taking and stating of the accounts, in which all the issues are finally centered. Such methods of outlining the several issues and giving notice of them in advance are promotive of fairness and serve a most useful

purpose in lightening the labors of the court and counsel. For these reasons the courts of late have shown a marked tendency to relax the ordinary rules regarding impertinence, and to permit a latitude of allegation in bills of this sort, which is not allowed in other cases, where the material issues are far fewer in number and of a much simpler nature."

The authority of the Railroad Commission to make an order promulgating rates for future guidance is derived from the Legislature. It is a delegated authority of an administrative character and in derogation of the property rights of the carrier, and in derogation of the common law. It is not a power to manage or operate the properties as the Commission may deem advisable, nor is it the power to take charge of the rate making functions which still remain with the carrier. It is merely the power of regulation and supervision and control, subordinate to fundamental constitutional guaranties. The property of the carrier remains private property clothed with all the essential rights of private, property, but the uses are public, and in so far as the Legislature has authorized these uses to be supervised and regulated the authority of the Commission may be

conceded as within the constitutional power of the state. But the moment that the Railroad Commission under this, or any other statute usurps the functions of management and practical ownership of these properties and ceases to exercise merely supervisory and regulative authority the statute, if so construed, would be void. It is not within the power of any Legislative tribunal, without appropriation of this property and without the assumption of ownership by the state, to foreclose the right of the owner to a judicial hearing as to the reasonableness of any rate or order, or any body of rates, and this without regard to the question as to whether or not the income from such rates would be sufficient to avoid charge of confiscation in whole or in part. *The power to regulate is neither the power to destroy nor the power to manage*, nor can the Commission exercise a discretion in determination of questions of fact which might seem to justify a particular rate independently of the question whether or not such rate is or is not reasonable. This was the vital weakness in the order made by the Interstate Commerce Commission under review in *Southern Pacific Co. and Oregon & California Railroad Co. v. Interstate Commerce Commission*, 219

U. S. 433, where Mr. Chief Justice WHITE, speaking for the court, says at p. 443:

> "That is to say, the contention is that the order entered by the Commission shows on its face that that body assumed that it had power not merely to prevent the charging of unjust and unreasonable rates, but also to regulate and control the general policy of the owners of railroads as to fixing rates, and consequently that there was authority to substitute for a just and reasonable rate one which, in and of itself, in a legal sense, might be unjust and unreasonable, if the Commission was satisfied that it was a wise policy to do so, or because a railroad had so conducted itself as to be estopped in the future from being entitled to receive a just and reasonable compensation for the service rendered. On the other hand, the Commission, in the argument at bar, does not contend that it possessed the indeed abnormal and extraordinary power which the railroads thus say was exerted in rendering the order complained of—a power which, if it obtained, would open a vast field for the exercise of discretion, to the destruction of *rights of private property in railroads, and would in effect assert public ownership without any of the responsibilities which ownership would imply.*"

X.

The provisions of the Railroad Commission Act of Oregon, that rates fixed and ordered substituted by the Railroad Commission, in lieu of rates found by them to be unreasonable or unjustly discriminatory shall be observed and followed in the future indefinitely, or until fixed anew, on complaint made, or on their own motion, is inequitable, and in violation of the Fourteenth Amendment of the Federal Constitution, providing that, "No state shall deny to any person within its jurisdiction the equal protection of the laws."

Village of Saratoga Springs v. Gas Co., 191 N. Y. 123.

This section provides that the rates fixed and ordered substituted by the Railroad Commission, in lieu of the rates found by them to be unreasonable and unjustly discriminatory, shall be observed and followed in the future indefinitely, or until fixed anew on complaint made, or on their own motion. The latter part of Section 28 of the Railroad Commission Art provides that: "This section shall be construed to permit any railroad to make complaint with like effect as though made by any person, firm, corporation,

or association, mercantile, agricultural or manufacturing society, body politic or municipal organization." But there is no provision in this section or anywhere in the Railroad Commission Act, giving a railway company the right to make a complaint to the Railroad Commission, that the rates established by the Commission are unreasonable, or unjustly discriminatory, or unfair to the railway company. In other words, if the Railroad Commission, after investigation, finds that the rate, or rates, fares, charges, or classifications fixed by the railway company are unreasonable, or unjustly discriminatory, the Commission has the power to substitute therefore a rate or rates, charges, fares, or classifications, as it shall have determined to be just and reasonable, and the rate, rates, fares, charges, and classifications thus fixed by the Commission must be followed in the future by the railway company.

It will be seen, therefore, that this Act, while it provides a remedy for the shipper against rates which are unreasonable or unjustly discriminatory, denies to the railway company the right to make any complaint to the Commission, that rates established by the Commission are unjust or unreasonable. This act gives the right to

the shippers to file a complaint against the railway company before the Railroad Commission, while the railway company is compelled to go to the courts for redress. In this respect it is in conflict with the Fourteenth Amendment of the Federal Constitution in that it deprives the railway company of the equal protection of the laws.

It cannot be said that the Railroad Commission Act, which gives the right to have the rates of a railway company reduced to reasonable rates, on complaint being made to the Commission against the railway company, and makes no provision whatever authorizing the railway company to have the rates fixed by the Railroad Commission increased to a reasonable rate, upon complaint made by the railway company to the Commission, affords the equal protection to the public and the railway company. True, the Railroad Commission Act provides that if any railroad interested in, or affected by, any order of the Commission fixing any rate or rates, be dissatisfied therewith, it may commence suit in the Circuit Court of Marion County, Oregon, against the Commission, to vacate and set aside any such order on the ground that the rate or rates prescribed or fixed by the Railroad Commission are unreasonable and unjust.

But in this Act there is no provision giving to the railway company the right to apply to the Commission in the first instance, and if it files suit to set aside the order made by the Railroad Commission, it does so at the peril of being subjected to the payment of a penalty of not more than $10,000 nor less than $100.00, for neglecting to obey the order of the Commission. Sending a railway company to a statute handicapped by such penalties is a vivid illustration of "keeping the word of promise to the ear and breaking it to the hope." It is submitted that this Act is clearly a violation of the Constitutional right of appellants to the equal protection of the law.

It is respectfully submitted that the order of the Circuit Court sustaining the demurrers to the bill of complaint, and the decree dismissing the bill, should be reversed.

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